

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 981

[Docket Nos. AO-214-A7; FV93-981-1]

#### Almonds Grown in California; Recommended Decision and Opportunity To File Written Exceptions to Proposed Further Amendment of Marketing Agreement and Order No. 981

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule and opportunity to file exceptions.

**SUMMARY:** This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order for almonds grown in the State of California. The proposed amendments would: Amend five existing definitions in the order; revise board representation, nomination procedures, terms of office, quorum and qualification procedures, voting and tenure requirements; modify creditable advertising provisions; revise volume control procedures; require handlers to maintain records in the State of California; authorize interest or late payment charges on assessments paid late; provide for periodic continuance referenda; authorize exemptions for organic almonds from certain program requirements; and make necessary conforming changes. These proposed amendments are designed to improve the administration, operation and functioning of the California almond marketing order program.

**DATES:** Written exceptions must be filed by May 8, 1995.

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1079-S, Washington, DC 20250-9200, Facsimile number (202) 720-9776. Four copies of all written exceptions should be submitted and they should reference the docket numbers and the date and

page number of this issue of the **Federal Register**. Exceptions will be made available for public inspection in the Office of the Hearing Clerk during regular business hours.

#### FOR FURTHER INFORMATION CONTACT:

Kathleen M. Finn, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523-S, Washington, D.C. 20250-0200; telephone: (202) 720-1509, or FAX (202) 720-5698; or Martin Engeler, Assistant Officer-In -Charge, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, suite 102-B, Fresno, California 93721; (209) 487-5901 or FAX (209) 487-5906.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on August 3, 1993, and published in the August 17, 1993, issue of the **Federal Register** (58 FR 43565).

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

#### Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed further amendment of Marketing Agreement and Order No. 981, regulating the handling of almonds grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Kathleen M. Finn or Martin Engeler whose addresses are listed above.

This action is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendment of Marketing Agreement and Order No. 981 is based on the record of a public hearing held in Modesto, California, on November 3, 4 and 5, 1993. Notice of this hearing was published in the **Federal Register** on August 17, 1993. The notice of hearing contained several proposals submitted by the Almond Board of California (Board), which

locally administers the order, and other interested parties.

The Board's proposed amendments would: (1) Increase its membership by two positions and change Board nomination, selection, and operation procedures; (2) change the term of office of its members from one to three years, and limit the tenure of Board members; (3) change the definitions of "cooperative handler," "to handle," "settlement weight," "crop year" and "trade demand"; (4) require handlers of California almonds to maintain program records in the State of California; (5) change its advertising assessment credit program to allow credit for certain advertising costs incurred by handlers not previously authorized; (6) require handlers to pay interest and/or late payment charges for past due assessments; (7) provide for continuance referenda every five years; (8) require handlers to submit grower lists; and (9) allow multi-year contracting.

Five persons submitted additional proposals related to continuance referenda, Board composition and nomination procedures, organic almonds, regulatory provisions, advertising and promotion, assessments, compliance audits, the definition of grower, and research and reserve operations.

At the hearing, Mr. Brian C. Leighton, on behalf of Cal-Almond, Inc., withdrew five of his proposals that were listed as proposal numbers 27, 30, 32, 33, and 38 in the Notice of Hearing. In addition, there was no evidence provided with respect to proposal numbers 42, 43, and 45 as listed in the Notice of Hearing. Therefore, these proposals are not included in this Recommended Decision.

The Notice of Hearing also included proposals by the Fruit and Vegetable Division, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, to make such changes as are necessary to the order, if any or all of the above amendments are adopted, so that all of its provisions conform with the proposed amendment. The Department also proposed that continuance referenda be conducted on a periodic basis consistent with the Department's policy guidelines.

At the conclusion of the hearing the Administrative Law Judge fixed February 28, 1994, as the final date for interested persons to file proposed

findings and conclusions or written arguments and briefs based on the evidence received at the hearing. The following persons submitted documents: Mr. Robert J. Crockett, Attorney for the Board; Ms. Suzanne Vaupel, Attorney representing several organic almond growers; and Mr. Steven W. Easter, Vice President of Blue Diamond Growers.

### Small Business Considerations

In accordance with the provisions of the Regulatory Flexibility Act (RFA), the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$500,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$5,000,000.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that handlers would not be unduly burdened by any additional regulatory requirements, including those pertaining to reporting and recordkeeping, that might result from this proceeding.

During the 1993-94 crop year, approximately 115 handlers were regulated under Marketing Order No. 981. In addition, there were about 7,000 producers of almonds in the production area. The Act requires the application of uniform rules on regulated handlers. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

The proposed amendments to the marketing agreement and order include changes to five definitions in the marketing order. These definitions are cooperative handler, to handle, settlement weight, crop year, and trade demand. The changes that are proposed to the definitions are intended to make them consistent with current industry practices. The proposed changes to the definitions are designed to enhance the administration and functioning of the

marketing order to the benefit of the industry.

The proposed amendment to revise Board representation would increase the Board's size by allowing two additional grower members to serve on the Board. This would increase grower representation on the Board from five to seven and allow more grower input into Board decisions. The quorum size would also be increased to correspond with the increase in Board size. The change to the nomination procedures would require Board nominees to be nominated by January 20 rather than April 20 as currently provided. This would ensure that the new Board is seated prior to meetings where important decisions are made for the following crop year. These proposed amendments are designed to improve grower representation on the Board and allow the Board to function more efficiently.

The proposed amendment to change the Board members' term of office from one-year to three-year staggered terms would allow more continuity on the Board. This would allow the Board to focus more on long-term strategic goals and develop long-term approaches to problems in the industry.

The proposed amendment to require those persons nominated to the Board to qualify prior to their selection to the Board is an administrative change. This change would allow the selection process to take place in a more timely manner. The proposed amendment to add tenure requirements for Board members would allow more persons the opportunity to serve as members on the Board. It would provide opportunity for new ideas and approaches to issues that the Board addresses each year.

The proposed amendment to the creditable advertising provisions would provide for expansion of the promotional activities for which handlers may receive credit-back from their assessments. This would allow the Board to increase program flexibility for participating handlers.

The proposed amendment to allow the settlement weight for unshelled almonds to be determined on the basis of representative samples would be more consistent with current industry practices. There would be no increase in burden on handlers expected from this proposed amendment.

The proposed amendment to require handlers to maintain records in the State of California would improve the Board's administration of the program. It would also allow the Board to have the records available to them for compliance purposes. It is not expected that any additional costs would be

incurred by handlers to comply with this amendment.

The proposed amendment to add interest or late payment charges on assessments paid late would encourage handlers to pay their assessments on time. Assessments not paid promptly add an undue burden on the Board because the Board has ongoing projects and programs funded by assessments that are functioning throughout the year. The addition of such a penalty is consistent with standard business practices.

The proposed amendment to provide for periodic continuance referenda would allow growers the opportunity to vote on whether to continue the operation of the almond marketing order.

The proposed amendment to allow handlers to sell their reserve almonds and the accompanying reserve obligation to other handlers would help facilitate the operation of the reserve program by providing handlers more flexibility.

The proposed amendment to exempt organic almonds from certain program requirements would provide the organic segment of the industry more flexibility in marketing and selling their product. The proposed amendment would authorize organic almond handlers to be exempt from reserve requirements and advertising assessments. Organic growers and handlers demonstrated at the hearing that certain current marketing order provisions do not take into account marketing differences between certified organic almonds and conventional almonds.

All of these changes are designed to enhance the administration and functioning of the marketing agreement and order to the benefit of the industry. Accordingly, the Administrator of AMS has determined that the proposed revisions of the order would not have a significant economic impact on handlers and growers.

The amendments proposed herein have been reviewed under Executive Order 12778, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection

with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping provisions that are included in the proposed amendments would be submitted to the Office of Management and Budget (OMB). The provisions would not be effective until receiving OMB approval.

### Material Issues

The material issues of record addressed in this decision are as follows:

- (1) Whether to revise the existing definition for "cooperative handler";
- (2) Whether to revise the existing definition for "to handle";
- (3) Whether to revise the existing definition for "settlement weight";
- (4) Whether to revise the existing definition for "crop year" and to change the date that handler carryover and reserve inventory is reported to the Secretary to be used in fixing the salable and reserve percentages;
- (5) Whether to revise the existing definition for "trade demand";
- (6) Whether to increase membership representation on the Board, revise quorum requirements, allow voting by facsimile machines, only require the participation of 10 members when voting by facsimile machines, telegram or mail, increase the number of votes needed for Board actions, and increase the number of affirmative votes needed to make recommendations on reserve policies;
- (7) Whether to change the date for submitting nominees for Board membership to the Secretary;
- (8) Whether to revise the terms of office and add tenure requirements for members and alternates;
- (9) Whether to require a written acceptance with the background statement from nominees;
- (10) Whether to expand activities for which handlers may receive credit under the credit-back advertising and promotion provisions;
- (11) Whether to revise the provisions regarding the determination and

redetermination of kernel weight for unshelled almonds and whether to eliminate the shelling ratios for unshelled almonds;

(12) Whether to change the deadline date for disposition of reserve almonds;

(13) Whether to delete the authority for the creditable advertising provisions and to modify the generic advertising and promotion program;

(14) Whether to authorize the Board, with the approval of the Secretary, to reapportion grower and/or handler member representation on the Board based on the proportionate amounts of almonds handled by different segments of the industry;

(15) Whether additional eligibility requirements should be added for grower members on the Board;

(16) Whether to require handlers to maintain records in the State of California;

(17) Whether to provide handlers advance notice before an audit or inspection is performed;

(18) Whether to require handlers to submit to the Board a complete list of growers who have delivered almonds to that handler during that crop year;

(19) Whether to authorize the imposition of interest and/or late payment charges for assessments that are paid late;

(20) Whether to authorize payment of interest in the event a suit or administrative petition on payment of assessments is successful;

(21) Whether to amend the definition of almonds to exempt certified organic almonds entirely from the marketing order;

(22) Whether to exempt certified organic almonds from advertising and promotion assessments;

(23) Whether to require that a minimum of 25 percent of funds collected for production research projects be spent on research and development of production methods which reduce or eliminate the use of synthetic chemicals in the production and handling of almonds;

(24) Whether to require that almonds grown and sold as "certified organic almonds" be exempt from the reserve provisions;

(25) Whether to authorize the Board to enter into contracts for periods up to five years for services, goods or other reasonable expenses;

(26) Whether to require that continuance referenda be conducted on a periodic basis;

(27) Whether to modify the reserve provisions of the order by eliminating the authority requiring reserve almonds to be sold in secondary or market development outlets and by authorizing

handlers to sell reserve almonds and the reserve obligation to other handlers;

(28) Whether to require that the first 250,000 pounds of almonds handled by a handler be exempt from reserve provisions; and

(29) Whether to require incoming inspections be conducted no later than the last day of February during the then current crop year.

### Findings and Conclusions

The findings and conclusions on the material issues, all of which are based on evidence presented at the hearing and the record thereof, are:

#### Material Issue Number 1

The term "cooperative handler" should be amended by referencing the California Food and Agricultural Code (California Code) in section 981.14 so that cooperative handler would be more clearly defined in the marketing order.

Currently, section 981.14 defines cooperative handler as any handler which is a cooperative marketing association of growers regardless of where or under what laws it may be organized. This definition is used for Board membership purposes only. Proponents testified that this definition needs to be amended to eliminate any misinterpretations or misunderstandings by the industry. Therefore, the proponents stated that the definition should reference the California Code which specifically defines a cooperative. Record evidence supported that the term "cooperative handler" should be defined in § 981.14 to mean any handler as defined in section 981.13 (Handler), and which qualifies for treatment as a non-profit cooperative association as defined in section 54001, et seq. of the California Code. Under this new definition, organizations would be unable to identify themselves as cooperatives under the almond marketing order unless they meet the specific criteria contained in the California Code.

At the hearing, there was concern about future modifications to the California Code which may be unacceptable to the almond industry. Record testimony indicated that it was more important to develop a concise definition that would help to alleviate current problems the industry is experiencing with misunderstandings under the current cooperative definition than to be concerned that the State may develop an unsatisfactory definition of cooperative at some future date. If the definition of cooperative was amended by the State and the amendment rendered the definition unsatisfactory to the Board, it would become necessary to

amend the marketing order definition again. In the event the State definition changed but remained satisfactory for marketing order purposes, a change in the State's legal citation would still require a change in the order. Therefore, a provision is recommended to be added to the amendatory language to allow the Board, with the approval of the Secretary, to modify the definition through informal rulemaking if the cooperative handler definition is changed by California. This would allow the Board to change the definition without going through the formal rulemaking process. This proposed amendment is therefore recommended with the above modifications.

#### *Material Issue Number 2*

The term "to handle" in § 981.16 should be amended to mean to commercially use almonds of own production or to sell, consign, transport or ship or in any other way to put almonds grown in the area of production into any channel of trade for human consumption worldwide.

Currently, § 981.16 defines "to handle" to mean "to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of almonds owned by another person) or in any other way to put into channels of trade, either within the area of production or from such area to points outside thereof, or to receive as the first receiver thereof at any point of entry in the United States and Puerto Rico, almonds which have been exported therefrom and are submitted for reentry or are reentered free of duty \* \* \*".

At the hearing, proponents testified that the current definition should be amended to conform to the present state of the industry and to ensure that some entities not normally considered handlers who may sell almonds to channels of human consumption are subject to regulation.

This proposed amendment intends to clarify the current definition to insure that entities whose primary function is to remove hulls and shells from almonds (hullers and shellers) who retain some of the growers' almonds and sell them into human consumption channels are subject to marketing order regulations for those almonds sold to human consumption channels. These hullers and shellers are currently performing a handling function by taking title to the almonds and are covered under the current definition. However, the proponents believed that further clarification to the definition is needed in order to insure that hullers and shellers that perform handling

functions are regulated. Proponents testified that modifying the definition would ensure that high quality almonds are shipped into human consumption outlets. Proponents testified that because the new definition would be clear, certain hullers and shellers would be aware that they are subject to regulation under the marketing order. Because of this, the number of almond handlers regulated under the marketing order may be increased by this amendment, but the increase is not expected to be significant. This proposal is not intended to bring all hullers-shellers under the authority of the marketing order, but only those that perform handling functions by placing almonds into human consumption outlets.

The proponents also intended that growers not be considered handlers unless they prepare the almonds into a form ready for human consumption. In cases where growers deliver field run almonds to another entity, the Board wants to clarify that the entities that receive such almonds from growers and sell those almonds into human consumption channels are considered handlers under the marketing order. This proposed amendment is recommended.

#### *Material Issue Number 3*

The definition of the term "settlement weight" should be amended in § 981.18 to allow adjustments in settlement weight for inedible kernels.

The current section defines settlement weight as the actual gross weight of any lot of almonds received for the handler's own account, less adjustments for weight of containers, for excess moisture, and for trash or other foreign material of any kind. There is no adjustment specified for inedible kernels.

Handlers report to the Board the almonds they receive from growers in terms of settlement weight. If settlement is made on shelled almonds, the settlement weight equals the kernelweight. If settlement is made on unshelled almonds, the settlement weight is converted to a kernelweight basis in accordance with § 981.60 of the order. Volume regulations and other order obligations are imposed on handlers on the basis of kernelweight. Thus, the settlement weight of almonds received impacts a handler's reserve obligations. Such obligations do not accrue on those items deducted from the actual gross weight of the almonds received (e.g., trash and other foreign material).

Evidence at the hearing indicated that almond production has dramatically

increased since the inception of the marketing order. Therefore, the number of inedible kernels has also increased and the disposition of inedible kernels has become a major issue for the industry. Inedible kernel percentages are not currently deducted from the gross weight in determining settlement weight. This amendment is intended to allow handlers to deduct inedible kernels in settlement weight calculations and thereby, more accurately reflect the marketable quantity of almonds purchased by handlers.

This proposed amendment is recommended.

#### *Material Issue Number 4*

In § 981.19, the term "crop year" should be amended from "July 1 through June 30" to "August 1 through July 31" in order to more accurately reflect industry harvesting and marketing activities. This change should also be made for handler recordkeeping purposes.

If this proposal becomes effective, the proponents suggest having one 13-month fiscal year in the first year after implementation of the amendment to provide for a smooth transition of the modification. Almonds are normally harvested and received by handlers between August and November. Record evidence indicated that there was concern that, in the past, almonds were occasionally harvested as early as July. The Board representatives were questioned as to what effects early crop almonds would have on the change in fiscal year. For example, if a reserve was anticipated for the following crop year, a handler may wish to have July almonds apply to the previous crop year to avoid subjecting those almonds to reserve requirements. The same situation could apply if the assessment rate was raised. A handler could have July almonds apply to the previous crop year to avoid paying a higher assessment.

A statistical table submitted by the Department showed that for the past 12 years, no almond receipts were listed in July, even in a year where almonds were harvested in July. A Board representative stated that, in those situations, the almonds were held in a handler's plant and not inspected until August, so therefore they were not reported as received until August. This representative stated that, in the rare instance that almonds would be harvested in July, the almonds should be considered new crop almonds and held until August. However, it also was stated that under the proposed order amendment, July almonds would be

considered as applying to the current crop year and handlers could use that to their advantage by processing almonds in July and not subjecting them to a reserve if a reserve was recommended for the next crop year. It was stated that there was nothing in the proposal to prevent that situation from occurring. One independent handler's representative stated that his client would be the first to report almonds in July if it meant being able to avoid a reserve. Record evidence indicated that the amendatory language proposed by the Board should be modified to correct the potential for problems relating to this situation. Although the record indicated no almonds have been reported in July for several years, the amendatory language has been modified to correct this potential problem by adding a sentence to the definition which states that any new crop year almonds harvested prior to August 1 would be applied to the next crop year for purposes of assessments, quality control provisions and volume regulations. This proposed amendment is recommended.

Conforming changes are also necessary to the regulations to conform with the change in crop year. There were three proposals relating to conforming changes in reference to the crop year. One was withdrawn (Proposal No. 22) because it proposed changing § 981.441. Since the publication of these proposals in the **Federal Register**, this section has been completely modified and no longer references any dates relating to the crop year. It was proposed to amend § 981.467 by making a date change to conform with the change in the crop year (Proposal No. 23). It was proposed to amend § 981.472 by modifying the reporting periods for reports of almonds received to be consistent with the new crop year calendar (Proposal No. 24). This proposal was modified at the hearing to correct an error which appeared when published. Specifically, at the hearing, the proposal was clarified to amend paragraph (a) of § 981.472 by removing the dates "July 1 to August 31" and adding in their place "August 1 to August 31" and removing the dates "April 1 to June 30" and adding in their place the dates "April 1 to July 31".

A conforming change is also necessary to section 981.73 of the marketing order regarding the filing of periodic reports. Testimony confirmed the intent would be to change the July 15 reporting date to August 15 and the June 30th reporting date to July 31. In addition, § 981.49(b) should be amended by changing the date through

which estimates of handler carryover and reserve inventory must be calculated from July 1 to July 31. The above modifications have been made by the Department.

#### *Material Issue Number 5*

The definition of "trade demand" should be amended in § 981.21 to remove the option of not including exports as part of the trade demand.

Currently, the term "trade demand" means the quantity of almonds which commercial distributors and users such as the wholesale, chain store, confectionery, bakery, ice cream, and nut salting trades will acquire from all handlers during a crop year for distribution in the United States, Puerto Rico, and the Canal Zone, provided that in recommending the salable and reserve percentages for any crop year, the Board may include, with the approval of the Secretary, export outlets for almonds. Testimony indicated that, because of the growth of export markets, they should be recognized as an integral part of the trade demand for California almonds and that this proposal would more accurately reflect the true worldwide nature of today's almond industry. Statistics presented at the hearing confirmed the growth of the export market. Record evidence also indicated that conforming changes would be necessary to §§ 981.47 and 981.66 to correspond with this proposal by deleting phrases relating to trade demand including either domestic or domestic plus export. Paragraph (f) of § 981.49 should be deleted as it relates to the percentage of reserve almonds that may be exported. By making export almonds part of trade demand, the Board's ability to establish an export percentage is not necessary. This proposed amendment is recommended.

#### *Material Issue Number 6*

Sections 981.30 and 981.31 should be amended to increase Board representation from 10 to 12 members to strengthen the influence of growers on the Board. Section 981.30 establishes the number of representatives on the Board and § 981.31 sets forth the representation of the members.

Current Board representation consists of two members representing cooperative handlers, two members representing handlers other than cooperative handlers (independent handlers), two members representing growers who market their almonds through cooperative handlers, two members representing growers who market their almonds through independent handlers, one member representing handlers (cooperative or

independent handlers) who through March 31 of the then current crop year handled more than 50 percent of the crop, and one member representing growers whose almonds were handled through the handler group that handled more than 50 percent of the crop.

Record evidence indicated that adding one additional grower representing cooperative handlers and one additional grower representing independent handlers would increase grower representation on the Board. This would allow additional grower input in Board decisions.

The date for computing the percentage of the crop handled by the entities who handled more than 50 percent of the crop is also being amended from March 31 to December 31 of the then current crop year to allow more adequate time for the election process. The election process for independent member and alternate member positions on the Board requires that candidates submit their names for inclusion on a ballot to be mailed prior to a specified date (currently April 20). Handlers then vote for handler members and alternates. Each handler vote is weighted by the quantity of almonds handled in a prior period. Growers vote for grower members, with each vote equal in weight.

Record testimony and statistical evidence indicated that at least 95 percent of the crop is harvested by December 31 and modifying the date in this section would have little or no impact on the percentages computed in determining which group handled more than 50 percent of the crop for that year.

Section 981.40 should be amended by revising paragraphs (b) and (c) and amending paragraph (e) by removing the word "seven" and adding in its place the word "eight." This proposal would change the quorum size and the number of votes required to recommend certain activities. Specifically, the proposal intends that all Board decisions shall be as follows: If eight or nine members are present, six affirmative votes will be needed to pass an action; if 10 members are present, seven affirmative votes will be needed to pass an action; if 11 or 12 members are present, eight affirmative votes will be needed to pass an action.

Currently, § 981.40 provides for a quorum size of six members and a majority vote of the members present to pass Board recommendations. In addition, § 981.40(e) provides that seven affirmative votes are required for Board recommendations with respect to projects pursuant to § 981.41 involving production research, marketing research and development projects, and marketing promotion including paid

advertising and crediting the pro rata expense assessment obligation of handlers with such portion of their direct expenditures for marketing promotion including paid advertising.

Witnesses testified at the hearing that the change in the quorum size and number of votes needed to pass Board recommendations including those under § 981.41 would be needed if the Board is increased from 10 to 12 members. With the increase in membership from 10 to 12 members, the Board believes that more stringent quorum size requirements would ensure that the almond industry is well represented at Board meetings.

An opponent testified that the two-thirds majority component is undemocratic because it allows the minority to effectively have veto power over a majority of elected representatives. Another opponent testified that because the cooperative segment will always have a minimum of five votes, it has the ability to block Board actions. This witness stated that although the independent segment has the same ability, history has shown that it is rare for the independent segment to vote in unison. This witness testified that since 1950, the cooperative segment voted together on every occasion, except two.

The proponent testified that a two-thirds requirement would help increase industry cohesion and harmony on important issues that come before the Board. The proponent also believes that the almond industry would become stronger as a result of this change as all industry factions would work together to find common ground. Witnesses testified that industry unity is a major factor when the Secretary reviews recommendations submitted to the Department for action or approval.

Although the independent and cooperative segments have the ability to block Board actions by voting in unison, neither could alone carry enough votes to pass a recommended action under this proposal's voting requirements. With the two-thirds majority, voting in unison by one segment of the industry could keep an action from passing. However, under a simple majority, one segment of the industry would be in a position to actually pass a Board action with its seven votes. This could allow Board actions and recommendations to be approved with only the support of one industry segment.

Record evidence supports the quorum size being increased to a two-thirds majority. Although there was testimony in opposition to increasing the number of votes required to pass Board recommendations from a simple

majority to an approximate two-thirds majority, the testimony in favor of this proposal by the Board, the Processors and Hullers Association and the Almond Growers Council strongly supports this proposal. As stated previously, this proposed amendment will allow for more diverse support for Board activities and is, therefore, recommended as proposed.

Record evidence indicated that the two-thirds voting requirement has been used by the Board's public relations and advertising committee and has been successful. The general belief of the committee members is that the requirement has been very beneficial in helping them reach consensus on major issues.

Section 981.49 should also be amended to increase the required number of votes when recommending saleable and reserve percentages to the Secretary.

Record evidence indicates that the number of affirmative votes required to recommend saleable and reserve percentages should be increased from six to eight. This change would require more stringent voting requirements for reserve recommendations than those for other Board actions in some cases. Such requirements would ensure that broad industry support exists for such recommendations. This proposal was unanimously supported by the Board and was supported by the Almond Growers Council. No opposition testimony was presented at the hearing.

Additionally, this proposal addresses the issue of voting by methods other than at assembled meetings. Currently, § 981.40 states that votes conducted by mail or telegram must be unanimous to pass an action. Thus, even one negative vote would cause an action to fail. The proposal would add facsimile machines as a method of voting, and would require 10 affirmative votes out of a possible 12 votes on an issue when voting by facsimile machine, telegram or mail for an issue to pass. Record evidence indicated that, in the past, important Board business was sometimes delayed by a member failing to respond by telegram or mail for an issue to pass. The recommended change would alleviate this problem and would increase the Board's options in voting outside of assembled meetings.

These proposed amendments are recommended.

#### *Material Issue Number 7*

Section 981.32 should be amended to change the nomination deadline for Board nominees from April 20 to January 20 and to change the deadline for presenting the nominees for

selection with the Secretary from May 20 to February 20. Section 981.33 should also be amended to change the beginning of the term of office from June 20 to March 1. These proposals are intended to ensure that the new Board members and alternates are seated prior to meetings where important decisions are made for the following crop year. These issues could relate to setting assessment rates, adopting budgets, approving production research or advertising programs or setting a reserve. Testimony showed that this proposal would allow new Board members and alternates to be seated by March 1, which would help alleviate this problem as most of these decisions are made after March 1 but before June 20.

The above proposed amendments are recommended.

#### *Material Issue Number 8*

Section 981.33 should be amended to change the Board members' terms of office from one year to three year staggered terms to provide continuity of operation. This section should also be amended to limit these terms to six consecutive years. Currently, Board members serve for a term of one year with no limitations on the number of terms members can serve. The intent of one-year terms was to have a Board that reflected the current interests and wishes of the almond industry.

Because of the many complex issues facing the almond industry today, testimony indicated that more emphasis should be placed on long-term strategic goals. Three year terms for some Board members would allow the Board the opportunity to work together on industry issues and develop long-term approaches. This would also provide continuity on the Board from one year to the next year. The two new grower positions proposed to be established under this formal rulemaking process under § 981.31(c) would remain at one-year terms. The record evidence indicated that these two positions are swing positions, which means that they would be subject to change each year depending on whether the independent handlers or the cooperative handled the majority of the tonnage.

With this proposal, it is intended that each year the terms of office of three of the members would expire, except every third year when the term of office for four of those members would expire. To accomplish this, initially, three members would serve for a term of one year, three members would serve for a term of two years and four members would serve for a term of three years. At the time of nomination the Board shall

make this designation by lot. To the extent practicable, the designations should be equitable between grower and handler positions and between cooperative and independent positions. The two new grower positions would always be for a period of one year. Nominees for each respective member and alternate position would be chosen by ballot delivered to the Board.

The modification to section 981.32 also stated that "each year the terms of office of one third of the Board shall expire, except in 1994, when all terms of office shall expire, except where otherwise provided." Record testimony revealed that it was not mathematically feasible for one-third of the Board terms to expire since 10 members serve 3 year terms and 2 members serve 1 year terms. A brief filed by Mr. Robert J. Crockett, Attorney for the Board, provided a modification to the amendatory language correcting the mathematical error as stated above as well as the reference to 1994.

Proponents also testified that section 981.33 should be amended to require a term limitation of nine years for Board members. Record evidence indicated that alternate members' terms of office would not be subject to the nine year term limitation.

It is the Department's view that a limit on tenure for Board members would improve representation on the Board by allowing for different and more contemporary ideas, and that such a limit would be beneficial to the Board's operations. The Department's policy is that a Board member's consecutive service be limited to a total of six years.

At the hearing, proponents for the nine year tenure limitation testified that nine years was the Board's proposal, however, the testimony indicated that the proponents would not be opposed to a six year tenure requirement. Further, proponents testified that the Board would not be opposed to the Secretary extending the term of office limitation for a member if another qualified candidate was unable to be found willing to serve.

Thus, in conformance with the above policy, the Board's proposal for a tenure limitation of nine years for Board members should be modified to six years. Therefore, it is proposed that the order be amended to limit the tenure of members to six years. Tenure would not apply to alternates. The proposal intended that a person who has served less than the term amount may not be nominated to a new term if the total consecutive years on the Board at the end of that new term would exceed the tenure. For example, a member could serve for a two-year term and may then

be elected to serve in a position that has a three-year term. That member could not then be nominated to another three-year term because the length of service (eight years) would exceed the term limitation of six years.

Any member would become ineligible to serve on the Board after having served six consecutive years. Such individuals could again become eligible to serve on the Board by not serving on the Board for one full year as a member. Since there is no term limitation on alternate members, a member having served for six consecutive years could serve as a alternate member for a year and be eligible to serve again as a member. This limitation on tenure shall not include service on the Board prior to implementation of this amendment.

These proposed amendments are recommended.

#### *Material Issue Number 9*

Section 981.34 should be amended to require those persons nominated as Board members or alternate members to qualify prior to their selection by the Secretary by stating that they agree to serve in the capacity for which they were nominated.

Currently, any person selected to be a member or alternate member on the Board is required to qualify by filing a written acceptance with the Secretary after such selection is made.

At the hearing, proponents testified that the proposal is designed to remove the possibility that a person who is unwilling to serve is appointed by the Secretary to the Board. This would be accomplished simply by requiring that the prospective candidate provide background information and at the same time advise the Secretary that he or she agrees to serve in the position for which nominated. All this information would be provided to the Department prior to the selection process. This proposal would allow candidates to be selected to the Board in a more timely manner.

Section 981.34 should also be amended to clarify who is eligible to serve in Board positions. Proponents testified that the eligibility requirements for member and alternate members on the Board should be clarified to more specifically state that grower members and alternates must be growers or employees of growers and handler members and alternates must be handlers or employees of handlers. Section 981.34 currently states only provisions relative to these persons ceasing to be growers, handlers or employees of growers and handlers.

There was further discussion at the hearing that the intent of the proposal would be to change the word "may" to

"shall". This would require that only such persons can serve in the grower and handler positions. This change has been made to amendatory language.

These proposed amendments are recommended.

#### *Material Issue Number 10*

Section 981.41(c) should be amended by revising the last sentence to allow the Board to expand the range of paid advertising activities for which handlers may receive credit-back from their advertising assessments. Section 981.41(c) should be amended by removing all text following the words "15 percent" in the last sentence and removing the colon after "15 percent" and adding in its place a period.

Currently, this provision lists activities that are not eligible for credit against a handler's assessment obligation. These activities include advertising production costs, preparation expenses, travel allowances, other expenses not directly connected with paid space or time, costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums and trade promotion allowances.

Hearing testimony indicated that by expanding the range of activities for which handlers may receive credit back from their assessments, the effectiveness of the industry's market development efforts will be improved. The proposal complements actions taken by the Board through informal rulemaking to replace a creditable advertising program with an expanded credit-back program. The proposal is intended to allow for a wider range of activities available for credit, thereby, providing handlers, especially those with no brand name, with additional opportunities.

Testimony against the proposal indicated that the new Credit-Back program compels handlers to advertise their products and directs handlers where and when to advertise almonds.

The marketing order does not compel handlers to advertise. The Credit-Back program is a voluntary program that allows handlers to receive credit-back from their advertising assessment if they engage in certain types of promotional activities. The proposed amendment would provide authority to expand upon an existing program by allowing the Board additional flexibility in recommending modifications to the regulations. Therefore, the proposed amendment is recommended.

#### *Material Issue Number 11*

Sections 981.60(b) and 981.61 should be amended and § 981.62 removed to allow the settlement weight for



unshelled almonds to be determined on the basis of representative samples of unshelled almonds reduced to shelled weight.

Currently, § 981.60(b) provides that unshelled almonds for which settlement is made on the basis of shelled weight shall be included in the total kernelweight for any handler at the settlement weight of such unshelled almonds multiplied by the shelling ratios in § 981.62. Settlement weight is the weight of almonds that handlers pay growers for upon delivery. Record evidence indicated that using a representative sample for determining kernelweight is a common industry practice. This practice would provide handlers with more accurate kernelweight figures. Current procedure under this section requires that shelling ratios be applied to the weight of unshelled almonds to arrive at a kernelweight. Shelling ratios are established by variety.

Proponents testified that representative samples would be taken by handlers on almonds received at the handler's premise under the supervision of the Department's inspection service or by the inspectors themselves. A sampling plan would be developed by the Board each year and would prescribe the size of the sample to be taken dependent on the actual weight of the load. For example, the plan would consist of sampling procedures for each handler to use that would coincide with the quality of the almond crop for that particular year. Evidence supported an appeal process if any handler disagreed with the actual representative sample taken. The appeal process would begin with the complaint being brought before the quality control committee (a subcommittee of the Board). If a handler did not receive satisfaction through the quality control committee, the handler could then take the complaint to the full Board.

Evidence also supported amending § 981.61 of the marketing order. Currently, § 981.61 provides that, three times during the crop year, the Board redetermine the kernelweight of almonds received for the purposes of computing each handler's reserve obligation. Section 981.61 further provides that the weights used in such computations for redetermining the kernelweight for unshelled almonds be computed by application of shelling ratios authorized pursuant to § 981.62.

Proponents testified that this is a companion proposal to the issue of determining settlement weight for unshelled almonds. Therefore, § 981.61 should be amended to allow the Board to redetermine the kernelweight of

unshelled almonds by using a representative sample reduced to shelled weight. Record evidence indicated that this amendment would provide that the best and most common practices are being used for redetermining kernelweight.

Finally, the record evidence supported removing § 981.62 from the marketing order. Currently, § 981.62 contains a table of shelling ratios for each variety of almonds. These varietal shelling ratios are used for computing kernelweight for unshelled almonds. Record evidence indicated that these shelling ratios are no longer necessary to compute the kernelweight for unshelled almonds since the proponents have recommended using representative samples to compute such weight. Also, the shelling ratios are outdated because new varieties of almonds have been developed since the marketing order's promulgation.

Proponents testified that the amendments to §§ 981.60, 981.61 and 981.62 are intended to reflect the industry's current practices and provide a more accurate kernelweight figure.

These proposed amendments are recommended.

#### *Material Issue Number 12*

Sections 981.66(e) and 981.67 should be amended by changing the disposition date for reserve almonds from September 1 to December 31. Currently, these sections require reserve almonds to be disposed of by handlers by September 1 of the following crop year. If any reserve is remaining after that date, the Board is required to dispose of the reserve through the most readily available reserve outlets. The order also provides that the September 1 date may be extended by the Board to a later date, if necessary.

Record evidence indicated that a December 31 date is a much more practicable deadline date than the current date. When the order was first promulgated, the almond industry was much smaller and the majority of the crop was sold in the fall. At that time, there was little need for storage and storage techniques did not allow the product to be stored for a long period of time.

Proponents testified that the almond crop today is much larger and storage capabilities allow handlers to store almonds for a year or more. The last two times that an almond reserve was in effect, the Board recommended that the September 1 disposition date be extended to December 31. The record evidence showed that a December 31 disposition date is a more realistic deadline for the industry based on

current industry practices. This proposal would also provide that the December 31 disposition date may be extended by the Board to a later date, if necessary, with the Department's approval.

The proposed amendment is recommended.

#### *Material Issue Number 13*

Sections 981.40 and 981.41 should not be amended to delete the authority for the Credit-Back advertising program under the almond marketing order and to modify the generic program. In addition, § 981.81 should not be amended to conform with the proposal to amend §§ 981.40 and 981.41. A proponent of this proposed amendment testified that the program is unconstitutional and a waste of the growers' money. The program also requires several office hours and many hours to complete forms to participate in the program. Further, the proponent testified that by the time handlers get done wasting their money on the current regulations, they have no funds left to advertise almonds in the way they would prefer.

The proponent testified that other areas of the Credit-Back program are burdensome and wasteful to the handlers. One area is that handlers only receive credit-back for that portion of the product weight represented by almonds or the handler's actual payment, whichever is less. The proponent testified that this area of the Credit-Back program is unfair because handlers should be paid back for all their advertising since they moved a lot of almonds into the marketplace. Further, the almond is used as an ingredient product and many handlers sell almonds into that market. The proponent testified that the Board should not care where the almonds are sold (e.g., cereals, candy, ice cream, etc.). The Board should only be concerned about moving California almonds into the marketplace.

Another area of concern expressed by the proponent was that the government can dictate to handlers where to advertise and where not to advertise, where they can get credit and where they cannot get credit.

The proponent testified that it is not opposed to the generic advertising program. However, the witness proposed that the Board should not be allowed to engage in promotion directed solely at snack almonds nor should the primary purpose of any Board advertising or promotion be directed for the consumption or sale of snack almonds. The proponent testified that 95 to 98 percent of the entire almond



production is for ingredient uses and not for snack almonds. Therefore, the witness testified that Board funds for the generic program should be spent on ingredient use.

Testimony from the opponents at the hearing indicated that actions have been taken and additional recommendations are being made to improve and expand the promotional activities for which handlers may receive credit-back from their assessments. The Credit-Back program is an example of an action which made the program more flexible. Another example is the proposal in this proceeding to further expand the range of activities for which handlers could get credit-back by amending Section 981.41(c), thus increasing program flexibility for those participating.

The opponents further testified that wide-spread industry support exists for the creditable advertising provisions and the authority should remain in the order. Opponents stated that this proposal eliminates handler choice and severely handicaps the industry in developing creative advertising and promotional activities. Regarding the portion of the proposal to prohibit promotion of snack almonds, opponents testified that problems would exist with attempting to define a specific type of almond as "snack." Opponents stated this part of the proposal is arbitrary and capricious because the size of the package, method of sale, product form or shape or other criteria do not define almonds as snack. The witness testified that snacking is a form of consumption rather than a form of product. Opponents believe that all forms of almond sales can and do benefit the industry.

On August 17, 1993, the Department issued an interim final rule (58 FR 43500) which implemented a new Credit-Back advertising and promotion program. The new Credit-Back program substantially revised the creditable advertising program whereby handlers may receive credit against their assessment obligation for their individual promotional activities, in lieu of contributing entirely to a generic promotion program administered by the Board.

Although the new Credit-Back program allows credit for the percentage of almonds in other products, the program is designed to promote the sale of almonds and almonds in products, not the products that contain almonds. The Credit-Back program was recommended to the Department by the Board which is comprised of independent and cooperative members which represent the almond industry. The Credit-Back program is a voluntary

program that allows handlers to receive credit-back from their advertising assessment if they engage in any of a broad range of promotional activities.

Research studies show that promotional programs conducted under the almond marketing order have been effective and are a good investment of industry funds. The Credit-Back program combined with the Board's generic program is a proven method of promoting almonds. The combined generic and Credit-Back program administered by the Board recognizes the positive aspects of both forms of promotion and has been proven to be successful and responsive to changing needs and desires of the industry over time.

We agree with the view that the marketing order promotion and advertising provisions should remain as flexible as possible and provide choices for the Board in determining how best to promote almonds. Removing authority for a Credit-Back program would reduce the options available to the industry for promoting its product. Maintaining that authority does not mandate use of such a program, it merely preserves an available tool.

It is determined that this variety of options can only benefit the industry. It is also determined that restricting the generic program by not allowing promotions for snack almonds also would unnecessarily limit choices for the Board and would not serve any useful purpose.

Accordingly, the record evidence does not support the amendment to eliminate the creditable advertising provisions or to modify the provisions as recommended in this proposal. Therefore, this proposed amendment is not recommended.

#### *Material Issue Number 14*

Section 981.32 should be amended to authorize the Board, with the approval of the Secretary, to reapportion grower and/or handler member representation on the Board based on the proportionate amounts of almonds handled by different segments of the industry.

A proposal was submitted and testimony received at the hearing which would require that cooperative representation on the Board not exceed the percentage of the industry tonnage handled by the cooperative in the immediately preceding crop year. However, no specific amendatory language was provided by the proponent.

At the hearing, the proponent testified that the industry's major cooperative marketing association, Blue Diamond Growers, Inc. (Blue Diamond), should

not be guaranteed five of the 12 seats on the Board. The proponent testified that it is no longer democratic to provide Blue Diamond with five seats on the Board since the industry percentage of almonds handled by Blue Diamond has decreased. The proponent provided the following example of how the proposal would work: If Blue Diamond handled from 45 to 55 percent of the industry tonnage, Blue Diamond would have five seats; 35 to 44.9 percent, Blue Diamond would have four seats; 25 to 34.9 percent, Blue Diamond would have two to three seats. The proponent stated that this would prevent a single entity, such as Blue Diamond, from bloc voting on Board proposals. The proponent further stated that, currently, Blue Diamond has an unfair advantage by being allowed to always have five seats on the Board.

Opponents to this proposal testified that the Board's proposal to increase the number of members from 10 to 12 would provide additional grower representation on the Board. The proposal to increase the number of Board members represents the overwhelming sentiment of the industry. Opponents also testified that, in the past, the cooperative was able to have a majority of the Board's membership because of the amount of tonnage it handled. However, that is not the situation that exists today, as independent growers and handlers currently hold a majority of the Board's member positions.

Another opponent testified that, even with the decline in the percent of total crop handled by Blue Diamond, their membership exceeds 50 percent of the total number of California almond growers. Further, other opponents testified that the proposal is directed at only one organization, and fails to take into account that, even at 30 percent of the crop handled, the cooperative would still represent over 50 percent of the total number of almond growers in the State of California.

The proponent testified that, without obtaining a list of the cooperative's growers, it is not possible to determine if, in fact, the cooperative does represent over 50 percent of the total number of growers in the State of California. The proponent further testified that Board representation should be based on tonnage in all circumstances.

An opponent testified that if, in ten years, the cooperative represented ten percent of the industry, the cooperative should not have five seats on the Board. Another opponent testified that he would prefer the whole industry to operate on a tonnage basis.

Record evidence indicates that currently, there is strong industry

support to maintain Board membership representation with the cooperative and independent segments being authorized to hold the specified numbers of seats proposed in Material Issue Number 6. However, in the event the industry structure changes in future years, there may be a need to further modify the structure of member representation.

Record evidence does not support amending the marketing order as the proponent recommended. The evidence does support, however, authorizing the Board, with the approval of the Secretary, to modify the membership representation requirements in the future if the industry structure changes.

This would allow the Board, with the approval of the Secretary, to recommend modifications to the representation requirements, if necessary, through informal rulemaking procedures. This would provide additional flexibility in the program by providing and ensuring that the Board continues to fairly represent all segments of the industry.

Therefore, this proposal is recommended, in part, by authorizing the Board, subject to the approval of the Secretary, to reapportion the grower and/or handler member representation among the 12 member positions, of any group listed in the proposed § 981.31 (a) through (c) to be nominated as a Board representative. This proposal does not intend that the Board may increase or decrease the number of members on the Board. The Board may reapportion the positions within the 12 member Board. A new paragraph (d) has been added to § 981.31 to set forth this recommendation.

#### *Material Issue Number 15*

The proposed amendment to section 981.12 would have revised the definition of grower. At the hearing, the proponents for this amendment revised the amendatory language that was published in the Notice of Hearing as follows: For the purpose of holding a grower seat on the Board, a grower would be required to have over 50 percent of his or her involvement and income in the almond industry derived from growing almonds. A grower wishing to run for a seat would certify to this criterion on the nominating petition.

Proponents testified that, in the past, some grower seats have been occupied by persons who were basically handlers. It was perceived by growers that they consistently represented a handler point of view at the expense of the grower. The proposal is intended to ensure that the grower seats on the Board are represented by growers and the growers' interests are reflected and represented.

The proposal would only apply to independent growers who are nominated to become members or alternate members on the Board because its purpose relates to nominations for Board positions.

At the hearing, proponents testified that the grower would sign a certification that over 50 percent of his or her involvement and income in the almond industry was derived from growing almonds and would make that known to all growers when running for a Board position. If an opponent had signed the certification and it was well known that the opponent was basically a handler, the grower could raise that issue during the campaign. Proponents also testified that the grower would be making the determination as to the 50 percent involvement and income, and there would be no penalty for falsifying the certification. In addition, if a grower refused to sign the certification, the grower would be ineligible to serve on the Board.

Record evidence indicated that although certifications by growers could be signed during the nomination process, there is no procedure to verify such certifications, nor is there a penalty for a false certification. Therefore, the intent of this proposal would not be served.

The proposal has been modified by revising § 981.32, rather than § 981.12 as proposed by the proponents. Record evidence supported that the intent of the proposal is to only modify the definition of grower with respect to nominations of growers to the Board. It would not be appropriate to modify the grower definition under § 981.12 since this definition applies to the use of grower throughout the marketing order.

It is therefore proposed that a new paragraph be added under § 981.34 to further define grower for nomination purposes. The record evidence supports a grower definition that would allow growers to be nominated to the Board that would truly represent grower interests. However, the proponent's amendment would not be enforceable as proposed and would not accomplish the intent of the amendment. Therefore, the Department proposes that the Board be provided the authority, with the approval of the Secretary, to make recommendations to establish additional eligibility requirements for growers, for nomination purposes, through informal rulemaking. This would allow the Board to further explore avenues to accomplish the intent of the proposed amendment. The amendatory language therefore has been modified to add such authority.

#### *Material Issue Number 16*

Section 981.70 should be amended to require handlers to maintain records in California to provide Board auditors with reasonable access and improve program management. Currently, § 981.70 only requires that the handler's premises be accessible to Board auditors for records to be examined and audited.

At the hearing, proponents testified that Board auditors should not have to travel out of state to examine handler records. It is an economic burden on the Board, and therefore the almond industry, to pay travel expenses for Board auditors to travel out of state. In addition, it is necessary to have immediate access to handlers' records if compliance issues arise.

An opponent testified that handlers could be burdened by being required to maintain all records in California. He stated that some needed records could be the buyers' or the shipping company records. In addition, the witness testified that the terms "as well as other pertinent information regarding his or her operations" could lead to abuse if the person determining what is "pertinent" selects some unreasonable records such as tax returns to be maintained in California.

The purpose of this proposal is to keep handlers from maintaining all their records in a different state making it difficult for the Board to effectively audit handler's records. It is not intended that handlers maintain records in the state that would not normally be maintained, such as buyers' or shipping company records. This proposal does not intend to add any undue hardship on handlers and the proposal, as written, does not make unnecessary or unreasonable requirements on handlers. The language which would require different types of records than those specified, if necessary ("other pertinent information"), is necessary to account for the many different recordkeeping systems maintained by handlers.

Maintenance of records within the State of California would assure that the benefits from marketing order compliance activities exceed related costs. It is not expected that any additional costs would be incurred by handlers to comply with this amendment. Therefore, this amendment is recommended as proposed.

#### *Material Issue Number 17*

The proposed amendment to section 981.70 would have required that the Board provide handlers with 24 hours advance notice before they conduct audits of records and inspections of reserve almonds. In addition, handlers

would not have been required to provide any labor or equipment to the Board to facilitate inspections.

Currently, § 981.70 provides that each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of handler records and for inspection and observation of reserve almonds. The Board shall make such checks of almonds or audits of each handler's records as it deems appropriate or as requested by the Secretary to insure that accurate information as required in this part is being furnished by the handlers.

A proponent testified that handlers may be busy with almond buyers and may not have time to show all the records that Board auditors need to examine during an audit visit. The proponent testified that handlers should be made aware of the audit visit in order to make preparations to have the records made available for the audit. Further, the proponent stated that handlers should be treated like businesses and not as if they are under constant suspicion of violating the marketing order. In addition, the proponent testified that if a handler does not desire to assist and aid the Board in conducting the audit, the handler should not be required to furnish labor and equipment to do it. The handler should not be required to bear the expense or the liability of conducting handler audits.

The record evidence indicated that the almond industry is subject to Federal regulations under a marketing order. Regulated industries that choose to participate in a Federal program are subject to inspection of records. The marketing order currently contains authority to allow the Board to conduct checks of almonds or audits of each handler's records. Testimony indicated that the Board has the authority to make these visits without prior notice. The record evidence supports this provision remaining in order to properly carry out the regulatory aspects of the order.

At the hearing, additional testimony in opposition to the proposal indicated that Board staff usually schedules appointments with handlers ahead of time to maintain a positive and courteous relationship between the Board and the handlers. However, the reality remains that all handlers do not comply with the provisions of the marketing order. Opponents testified that removal of the authority to make unannounced visits to audit handlers would remove an important compliance tool from the Board and the Secretary. A handler with something to hide would have plenty of time to conceal

vital documents from scrutiny by authorized Board personnel.

Opponents further testified that most handlers prefer to conduct any movement of product by using their own personnel and equipment at their premises. Handler personnel would also be familiar with the location of reserve almonds that would need to be examined.

Accordingly, the record evidence does not support the amendment to require the Board to provide handlers with 24 hours advance notice before it conducts audits and inspections or for handlers to not be required to furnish any labor or equipment to the Board to facilitate inspections. Therefore, this proposed amendment is not recommended.

#### *Material Issue Number 18*

The proposed amendments regarding §§ 981.76 and 981.90 would each require handlers to submit to the Board a list of growers who have delivered almonds to such handler during the crop year. Because these proposals would provide for essentially the same recommendation, they will be discussed as one material issue.

The proposed § 981.76 would require each handler to submit to the Board, no later than December 31 of each year, a complete list of growers who have delivered almonds to such handler during the crop year. The proposed amendment to § 981.90 would require each handler to submit to the Board, no later than January 31 of each year, a list of names and addresses of all growers from whom such handler received almond production for the then current crop year.

Currently, the marketing order does not require such information to be submitted to the Board under any section. Such information is submitted to the Board by most handlers on a voluntary basis for nomination purposes.

Proponents testified that the proposals are intended to help the Board be more efficient in conducting elections for Board members and alternate members. Since the list is currently submitted to the Board on a voluntary basis, the Board is not assured that it has a complete and accurate list of growers to use in conducting the election of Board members. In order for the Board to operate efficiently, it is necessary for the Board to reach as many growers as possible. Mandatory submission of grower lists would help accomplish this goal. The proponents testified that the amendment would help provide the widest possible participation by growers in the election process.

The proponents stated that this requirement would respect the private business relationship between a grower and handler. The proprietary nature of the relationship would be respected by the Board and that information would not be divulged by the Board.

A proponent testified that the list would be used for annual elections of Board members and for periodic continuance referenda. The list would not reveal a grower's handler affiliation. This proposal would further provide that the Board could charge handlers and growers who request the list for photocopying and mailing.

A witness testified that the cooperative grower list is needed when periodic continuance referenda are conducted because other interested parties to a referendum have a right to know who those growers are so they are in a position to provide them information which may influence their vote. This witness further testified that the Board should know who these 4,000 growers are so they are aware if any of these growers become handlers.

The opponents to the amendment testified that it is a well-established fact that lists of members of agricultural cooperatives are considered proprietary information. The witness testified that there are no other programs in which cooperatives are required to release such a list and the Department has long recognized that cooperatives are not required to reveal the names of their members. Many farmers who belong to agricultural cooperatives do not want their names and addresses used for purposes other than those needed by the cooperative to properly perform its business functions. The opponents further testified that the only reason for a requirement for handlers to submit grower lists is for the use in the election of Board members representing those marketing through independent handlers.

Opponents testified that Board elections have been conducted with wide publicity and all growers have an opportunity to participate. The cooperative informs all its members when elections do take place even though Board members are nominated by the cooperative's board of directors.

An opponent testified that the release of such information would be controlled directly by the Department, which in turn is controlled by the Administrative Procedure Act, the Freedom of Information Act, and the Privacy Act, as well as court interpretations. By including the proposed language in the marketing order, the Board could face a situation in which the marketing order mandates release of information while

the Department and the courts or both may require that the information not be released. Therefore, the question of release of information should be left to the Department.

A brief filed by Mr. Steven W. Easter of Blue Diamond Growers stated that the two similar proposals discussed at the hearing were worded slightly differently but they essentially provide for the same thing. Both proposals are directed at requiring Blue Diamond Growers to turn over its cooperative membership list to the Board. Both proposals represent an effort by independent handlers and growers to obtain the membership list of their principal competitor, Blue Diamond Growers.

Mr. Easter stated that there is no other proposed amendment nor any current provision that requires a cooperative, including Blue Diamond, to furnish its membership list to the Board. It is well established that growers may contact the Board directly to be placed on the Board's mailing list. Mr. Easter also stated that Blue Diamond provides notice of all elections to its members directly. This satisfies Blue Diamond's contractual obligations with its members and the Board's desire to have all members of the industry notified of elections. The witness stated that this system has worked for 43 years.

Mr. Easter further provided in his brief that Blue Diamond's membership list contains the names and addresses of all of its grower/supplier members and is, in that sense, its customer list. Under California law, customer lists have been protected as trade secrets under the Trade Secrets Act so long as they meet the definition set out in California Corporations Code. In conclusion, Mr. Easter stated that elections to the Board and referenda on proposed amendments and continuation have taken place since 1950 successfully. The guidance provided by the Board has enabled the industry to move forward in a beneficial manner. Mr. Easter requested that the proposal be rejected.

The record evidence indicates that it would benefit the Board to have a list of independent growers' names and addresses. Board elections would be conducted in a more efficient manner and there would be greater assurance that all growers are informed regarding activities centered on Board elections. The record evidence supported that it is not necessary for the Board to obtain the names and addresses of cooperative growers for nomination purposes since those Board members are selected by the cooperative's board of directors. Although grower lists not revealing handler affiliation can be obtained by requesting the list from the Department

under the Freedom of Information Act, the Board is responsible for confidentiality of handler information and does not release a complete growers' list.

When continuance referenda are conducted, a method to ensure that ballots are provided to all cooperative growers would have to be derived. For example, one method would be for the Department to provide the ballots to the cooperative and obtain a sworn statement from a representative of the cooperative attesting that all growers were sent ballots. It would be in the best interest of the cooperative to ensure that all of its growers vote in referenda and USDA will ensure that a satisfactory method has been established when continuance referenda are conducted.

In the event a cooperative chooses to bloc vote for all its members in a referendum, the Department would require the cooperative to submit a grower list to verify that none of those members also voted individually. However, this is not sufficient reason to require the cooperative to submit a grower list to the Board on an annual basis since the Board does not need that list to conduct its operations.

Regarding the testimony that the Board needs to know the cooperative growers in case any of them become handlers, this does not appear to be sufficient reason to require this list from the cooperative. The Board has an established compliance program to address compliance issues and needs. Also, if a grower list is desired, such a list can be obtained from other sources. Testimony indicated there are alternative sources for that information.

For the above stated reasons, the proposed amendment is modified to allow the Board to request from independent handlers their growers' names and addresses for purposes of elections. The lists would be submitted no later than December 31 of each year to facilitate Board administration. The proposed amendment, as modified, is therefore recommended.

#### *Material Issue Number 19*

Section 981.81 should be amended to add authority to require handlers to pay interest and/or late payment charges in order to discourage late payment of assessments.

Currently, §981.81 requires handlers to pay to the Board on demand assessments on almonds received by the handler for the handler's own account. There is no provision for a late payment or interest charge.

The proponents testified at the hearing that the Board's experiences with collection of assessments for

administration, research and generic promotion have been frustrating. At the present time, about 90 percent or more of the handlers promptly pay the assessments when due, others are at times slow to pay. As of June 30, 1993, the Board was owed past due assessments totaling several million dollars. If these amounts had been paid promptly, the funds received could have been utilized for Board programs. The proponents do not believe that it is equitable for late paying handlers to benefit from the wide variety of Board programs financed by handlers who pay on time. Significant industry support is necessary in order for the marketing order to be successful.

An opponent to the proposal testified that handlers who challenge the assessment rate would be penalized if they pay the assessment in order to avoid the late charges because they would not recoup the assessments paid if they prevail in their challenge. This position is discussed in detail in Material Issue Number 20 which deals with another proposal to authorize payment of interest in the event a suit or administrative petition regarding payment of assessments is successful.

This witness further testified that if this proposal is authorized and regulations are implemented, it would be better to require that the payment be postmarked within 30 days from the invoice date rather than received in the Board office within 30 days.

The proponents testified that the Board envisioned implementing the specifics of the late payment and/or interest charges through informal rulemaking with the Secretary's approval. This would allow the Board to remain flexible with the establishment of the interest and/or late payment charge. The Board proposed language for the regulations in this proceeding. However, USDA has determined that this would be better accomplished by the Board recommending to the Secretary an informal rulemaking action at a later date if this provision is implemented.

The suggestion that payments be postmarked within 30 days of invoice to be considered timely does have merit. When assessing interest charges for late payment, it would appear reasonable that handlers be allowed 30 days from invoice to mail these charges to the Board. The Board should consider this suggestion when making a recommendation to the Secretary to implement the regulations regarding late payment and/or interest charges.

The record evidence supports this proposed amendment and therefore, it is recommended.

*Material Issue Number 20*

This proposed amendment to the order would have required refunds plus payment of interest to a handler in the event a suit or administrative petition filed by such handler challenging the payment of assessments is successful. No specific amendatory language was provided.

The proponent testified that there have been several challenges to the almond, orange and tree fruit marketing orders. In these cases, the proponent stated that the Judicial Officer of USDA did not authorize the prevailing handler to recoup the assessments paid. The proponent also testified that the Agricultural Marketing Agreement Act permits handlers to challenge provisions of federal marketing orders, including the establishment of assessment rates. The Board's proposal to add an interest and/or late payment charge would penalize handlers that challenge the assessment rate since they would have to pay the assessment to avoid the late charges but would not receive the assessment back if they prevail. In addition, the Department argued in court that the Board would have to vote for a prevailing handler to have assessments returned and the funds would have to be approved in the Board's budget.

The proponent further testified that it is better to address the issue at this time by putting the provision in the marketing order than to wait for the Department to tell the Board they have to pay the handler back their assessments plus interest. It was discussed at the hearing where the money should come from to pay back the handler, and the proponent testified that such money should come from the Department. If not from the Department, the money should come from the industry. The witness testified that the Department continues to approve every proposed rule for assessments over the proponent's objections, therefore, they should pay the money back to the prevailing handler.

Opponents to the proposal testified that they are opposed for three reasons. First, there was no language specified to analyze the proposal, therefore, their understanding of the subject was vague and undefined. Second, the proposal refers to the legal rate of interest which is not compatible with the Board's proposal. Third, the term "successful" is not defined to differentiate between an administrative ruling before a law judge or the final review by the Judicial Officer. The opponents further testified that such rulings may be reviewed by the District Court, therefore, this

proposal must be opposed because it does not clearly state at what point a handler could claim a refund of assessment and the accompanying interest. Also, depending on the timing of such refund, the Board may not have funds available to make the refund.

The proponent responded to the opposition by stating that he has no qualms with stating that the interest rate be the same as what the Board established. Also, that within 30 days of a final non-appealable decision being made, the Board should make the refund. Finally, if the Board does not pay back the prevailing handler in 30 days, the Board would be required to pay a five percent penalty.

The record evidence does not support this proposed amendment. Section 610b(2)(ii) of the Act provides that handlers regulated by marketing orders pay their pro rata share of such expenses as the Secretary may find are reasonable and likely to be incurred during a specified period for the maintenance and functioning of the marketing order. Section 608c(15)(A) of the Act provides a method for challenging marketing order provisions, including the requirement to pay assessments, through administrative petitions. In addition, several of the issues which this proposal raises are currently being appealed to the Ninth Circuit.

Therefore, this proposed amendment is not recommended.

*Material Issue Number 21*

The proposed amendment to section 981.4 would have amended the definition of "almonds" to exempt certified organic almonds from the entire marketing order.

Currently, the marketing order does not differentiate between almonds that are organically grown and those that are not.

The proponents for this amendment testified that the markets for organic almonds are totally separate from those for conventionally grown almonds. The organic tonnage of almonds in the industry is very small. The proponent testified that he empathizes with the organic growers since they do not want their money spent on Board programs that do not benefit organic almond growers and handlers. The proponent stated that the California Department of Food and Agriculture has strict requirements for certified organic commodities and penalties if growers violate them.

Opponents testified that it would be difficult to determine if an almond has truly been organically grown. While it is true there are voluminous regulations

on organic products, once the almonds reach the market place, it is impossible to discern organically-grown almonds from those that are not organically grown. In addition, the opponent testified that organic growers currently benefit from the various programs conducted by the Board. The Board is pursuing a very active program of promoting almonds. Organic growers benefit from the perceived value of almonds that result from such aggressive promotion programs. There are also many production research programs sponsored by the Board that benefit organic growers as well as other almond growers. They include crop irrigation management, bud failure, nematode infestation, integrated pest management and problems from Africanized honey bees. The opponent further testified that all segments of the industry are interested in finding the most cost-effective, reliable method of increasing production and delivering a high-value, safe product to the consumer. In addition, the opponent stated that the Board is committed to working with organic growers to ensure that their interests are considered in making Board recommendations.

Several organic growers and handlers submitted proposals for differential treatment under the almond marketing order, but did not propose the organic community be entirely exempt.

Accordingly, the record evidence does not support the amendment to exempt organic almonds entirely from the marketing order. Record evidence shows that organic growers do reap some benefits from the order and its programs, which include certain research activities and the new Credit-Back advertising program. Therefore, this proposed amendment is not recommended.

*Material Issue Number 22*

The proposed amendment to § 981.41 would require that handlers not be assessed for marketing promotion, including advertising for the number of pounds of certified organic almonds handled. Currently, there is no provision in the marketing order to exclude organic almonds from the marketing promotion program.

The proponents for this amendment testified that the proposal is intended to provide an exemption for certified organic almonds from the advertising assessments since advertising for conventional almonds is not relevant to the market for certified organic almonds. The market for organic almonds is not yet well developed and does not benefit from generic advertising of almonds. The market is a

niche market, made up of consumers who are seeking a guaranteed organic product. Any effective advertising must be geared to that market. The proponents testified that there are strict penalties for violating the certified organic regulations. Under Federal law, it is a violation to sell anything as organic that is not certified organic, and there is a fine of up to \$10,000. In addition, any person found to have violated the law can be prohibited from organic certification for five years.

The proponents stated that buyers of certified organic almonds include natural food stores, consumers through mail order, roadside stands, certified farmers markets and specialty health food distributors. The end user is a consumer looking for an organic product first. If the consumer cannot find organic almonds, the consumer is more likely to substitute a different organic product rather than conventional almonds. Under the current assessment program, even if the certified organic handlers fully participate in the credit-back program, 50 percent of their assessment would still support generic advertising which is not relevant to their market. This proposal would have a positive benefit on growers and handlers of certified organic almonds, most of whom are small businesses.

Another proponent testified that certified organic almond handlers need relief from the burdens and restrictions imposed by the Board. Certified organic almonds have very little in common with commercial almonds. Promotion and advertising requires a different direction and a totally different target market which is not acknowledged by the Board.

Testimony in opposition to the amendment indicated that organic almonds should continue to fall under the marketing order and be assessed for marketing promotion. The opponent testified that all almonds benefit from generic advertising and promotion campaigns conducted by the Board. This includes growers that grow the Mission variety of almonds that appeals to the candy manufacturers. However, the opponent testified that Mission variety growers are not asking to be exempt from the order. The witness further stated that pooling industry resources can stimulate industry growth for the benefit of everyone. The opponent stated that the Board has made an effort to reach out to the organic growers and establish dialogue on key issues. The witness testified that there is a lot of common ground and that the industry can continue to build on that common purpose and interest by

working together rather than working apart.

The record evidence supports that the organic market is a separate and distinct market. Although testimony indicated that generic advertising for conventional almonds could have a limited effect on organic consumers, the organic industry may not benefit directly from the Board's generic advertising program. However, the evidence did show that organic handlers could derive some benefit from the Board's new Credit-Back advertising program. The Board has stated that it wants to work with the organic segment of the industry and recognize them as an important part of the industry. Therefore, the Department is modifying the amendment to provide that the Board may, with approval of the Secretary, exempt certified organic almond handlers from the advertising assessment through further informal rulemaking. This would provide the Board and the organic segment of the industry with the flexibility of exempting handlers of certified organic almonds from the advertising assessment. It would also provide for development of a framework to implement and verify compliance with such an exemption. Therefore, the proposed amendment is recommended as modified.

#### *Material Issue Number 23*

The proposed amendment to § 981.41 would require that a minimum of 25 percent of funds collected for projects involving production research shall be spent on research and development of production methods which reduce or eliminate the use of synthetic chemicals in the production and handling of almonds. Under the current marketing order, there is no requirement that a minimum amount be spent in any certain area.

The proponents testified that this amendment is intended to benefit all almond growers by finding ways to reduce and eliminate the use of synthetic chemicals. This effort is especially important in light of the restrictions on continuing availability and use of certain agricultural chemicals. Record evidence indicated that this research activity would be coordinated by the production research committee of the Board. The proponent recommended the appointment of one or more growers of certified organic almonds to the production research committee. The committee would issue a request for proposals that contribute to finding new production techniques which reduce or eliminate the use of synthetic chemicals. The committee would then allocate a minimum of 25

percent of funds, earmarked for research, for such proposals.

The proponents further testified that the amendment would require a positive effort to seek out and fund proposals that investigate ways to reduce chemical use. Such a pro-active policy by the Board would send a signal to the research community to generate these proposals. It would also send a message to the public that the Board is taking steps to improve the environment through reducing the use of synthetic chemicals. This effort is important to the future of the industry for two reasons: (1) Various agricultural chemicals commonly used by almond growers are being phased out and will be taken off the market by government regulations; (2) very little research is currently being conducted on non-synthetic alternatives for almond growers and handlers. The proponent testified that she is aware of only one Board research project in this area.

The proponent testified that this proposal would help all almond growers and handlers face the challenges of decreasing availability of agricultural chemicals and increasing pressure from environmental groups. Developing such alternatives would protect growers and handlers from potential large crop losses and would satisfy consumer demand for reduced chemical usage. The proposal would also have a positive effect on small businesses since most growers and handlers of organic almonds are small businesses.

At the hearing, opponents did not believe that one tenth of one percent of the industry should be in a position to dictate to the other 99.9 percent of the industry how to spend its funds, especially considering that this small segment is attempting to be exempt from certain major areas of the order. The proponent testified that the organic community believes that this proposal would be beneficial to the whole almond industry. Every grower is under pressure to reduce chemical use. The proposal would give the industry the tools to meet production needs and to reduce pest and diseases without using chemicals. It was further discussed that organic almond growers have not brought forth any research projects to the production research committee. Also, the proponent was not aware of any such research projects being turned down by that committee.

It was also discussed that the marketing order currently contains authority to accomplish the proponents' goal. If the proponents attended the production research meetings and provided information on the needed

research in those areas, they could possibly convince the Board to fund projects in the proposed area. In addition, testimony was offered that the Board may not be able to find within the research community projects to reach the 25 percent minimum that is proposed. The proponents testified that if a bona fide effort was made by the Board to obtain such projects, funding a lesser percentage would not be a problem. A bona fide effort by the Board would include: (1) Prepare a request for proposals that specified the type of research that is desired by the Board; (2) clarify the amount of money that is being set aside for that type of proposal; and (3) distribute widely to the universities, the extension service and to other known researchers, notice of the opportunities to conduct this type of research.

Another proponent of the amendment testified that some of the areas that need immediate attention are the study of soil biology, fungus control, climatic and economic thresholds, understanding the value of beneficial organisms, developing environmentally sound methods of production, wildlife habitat enhancement, etc. The proponent further testified that if the Board is spending its money, it should be on projects that directly benefit the organic farmer as well as the community at large.

The opponents testified that the Board has a very strong commitment to production research. Currently, the Board has budgeted \$500,000 for various research projects. The benefits of these studies are shared throughout the industry. The Board invites members of the organic almond community to participate at the production research committee meetings and take part in the process which determines which studies will be funded. The witness testified that the process of open committee meetings in which there can be active dialogue best lends itself to achieve the goal of this proposal. The witness testified that a bad precedent would be established by having a marketing order amendment to guarantee funding for one particular research project, no matter how well intentioned. Such action would leave the door wide open for a long line of groups demanding the order be amended to accommodate their needs. The witness testified that the framework exists which can be used by the organic community to make its case for funding projects as proposed.

The opponent also testified at the hearing that the Board is currently funding such type of projects. For example, one project is to find ways to

reduce the use of chemicals in controlling the navel orangeworm, which is one of the worst pests in the almond industry. Through the project, the Board has been instrumental in reducing such chemical usage, but their use has not been eliminated yet.

The record evidence does not support this proposed amendment. The authority is currently in the order for such projects as proposed to be conducted. In addition, the Board is currently funding projects which are intended to reduce the use of synthetic chemicals. Record evidence indicates that the Board wants to work with the organic almond community to recognize them as an important faction in the industry. If the organic almond community works with the Board and takes an active part in the process of determining the expenditure of production research funds, they will make their voice heard and assist the Board in making expenditure decisions that will help to benefit the whole almond industry.

The record evidence also supported that there may not be enough sources of research to obtain the proposed 25 percent of the production research funds and this proposal would be too restrictive for the Board. Therefore, for the above reasons, the proposed amendment is not recommended.

#### *Material Issue Number 24*

Sections 981.47 and 981.50 should be amended to require that the Secretary shall exempt from any reserve, that part of the crop which is sold as "certified organic almonds" under standards established by the Organic Foods Act of 1990 and the California Organic Foods Act of 1990. The Board may propose regulations to assure procedures to implement this section.

Currently, there is no requirement in the marketing order to exempt certified organic almonds from the reserve provisions.

The proponents testified that they are proposing the exemption because certified organic almonds are a distinct and different product from conventional almonds. There are many laws and requirements for a farmer to become certified as organic. First, the California Organic Foods Act of 1990 requires that any foods sold as organic are grown without the use of prohibited materials. Prohibited materials are all synthetic products. No prohibited materials can be used in the soil for at least one year prior to the season in which the crop is grown. Handlers are also restricted from using any prohibited materials. California law requires extensive recordkeeping by organic growers and

handlers. California law also requires that each grower and handler of foods sold as organic must be registered annually with the State. The State intends to strictly enforce provisions of the organic program. Two growers have been recently fined \$7,000 or more for violations. The certification process is quite lengthy and costly.

The proponent testified at the hearing that certified almonds are a distinct product from conventional almonds. They are sold into a different market than conventional almonds. The price for certified organic almonds is significantly higher, approximately 30 to 44 percent higher than for conventional almonds. Certified organic almonds only comprise about one-tenth of one percent of the total almond industry. A 1992 report by the University of California Cooperative Extension Service states that, "At present, no bulk commodity market exists for organically grown almonds. Because of this, market fluctuations and pricing of conventionally-grown almonds do not directly affect the market for organically-grown almonds". Certified almonds are sold in a niche market to consumers whose first concern is purchasing an organic product. If organic almonds are not available, the consumer will be more likely to substitute another organic product instead of conventional almonds. Many wholesalers and retailers of organic almonds do not purchase conventional almonds.

At the hearing, the proponent testified that a reserve requirement for certified organic almonds disrupts the market and is contrary to the intent of the provision. The market for certified organic almonds is chronically under-supplied. Therefore, a reserve which removes product from the market disrupts the flow of supply to the market.

The proponent testified that organic almonds are more difficult to store since most fumigation practices are prohibited. Although methods have been developed to store organic almonds, the normal marketing season of organic almonds is not as long as that for conventional almonds. Many organic growers therefore, use cold storage which can be quite expensive. When a reserve is implemented, handlers keep a percentage of certified organic almonds off the market and are unable to meet market demand. In addition, handlers have been unable to fill buyer orders even though they have certified organic almonds in reserve.

The proponent further testified that the proposal would have a positive impact on small businesses since most



organic almond growers and handlers are small businesses.

At the hearing, it was discussed that there is an extensive audit trail from the organic grower to the handler so there would be no confusion as to which almonds would be organic or conventional. Testimony was also offered that if a conventional lot and certified organic lot were commingled, the almonds could no longer be sold as certified organic almonds. Also, containers that include certified organic almonds have to be extensively identified.

Opponents at the hearing testified that certified organic growers do benefit from many programs under the almond marketing order. The reserve program is one such program that needs participation by all members of the almond industry. By excluding organic almonds from the reserve, a two-tiered system would be implemented creating dissension within the industry and in the long run would act against the organic growers' best interests by alienating them from the industry. The Board is supportive of attempts to include the interests of organic growers on all policy matters discussed by the Board. In the testimony by the proponents, they indicated that many of the regulations governing organic farming are just now being developed. The Board addressed this issue when the 1990 reserve was established. At that time, organic growers requested that the Board exclude or declare organic production a reserve outlet. That request was denied by the Board. It was thought at that time that the organic program was not fully developed and there could be a lack of a reliable system of certification and tracking. The opponent testified that there is now a complete system in place and given the information the Board now knows the Board could make a decision to use organic almonds as an outlet for reserve almonds. The witness testified that the marketing order currently contains language to accomplish what the organic community wants without this amendment. The organic almond production could be evaluated on a yearly basis to determine if certified organic almonds should be part of the reserve.

The record evidence supports the merits of this amendment. The proponents have presented a compelling case that certified organic almonds are unique and are sold into different markets. During a reserve year, handlers of organic almonds are unable to supply all of their buyers with certified organic almonds. The certified almond growers

and handlers must follow strict regulations to ensure that they are selling certified organic almonds in the marketplace. Certified organic almonds can be traced by a paper trail to the retail level. If commingling occurs with non-organic almonds, they are no longer considered certified organic. There are State and Federal laws regulating the practices of certification of organic products. Storing organic almonds is problematic because most fumigation practices are prohibited. Certified organic almonds currently comprise only one-tenth of one percent of the almond industry.

Certified organic almonds can currently be exempted from reserve provisions by designating them as an authorized reserve outlet under an agency agreement recommended by the Board and approved by the Secretary. This can be done on a yearly basis when a reserve is recommended. However, record testimony has shown that the imposition of a reserve on certified organic handlers in any year could be unnecessarily detrimental to this segment of the industry with no proven benefit to the industry as a whole. Therefore, the proposed amendment is recommended.

#### *Material Issue Number 25*

The proposed amendment to section 981.80 would have allowed the Board to contract for periods of five years for services, goods or other reasonable expenses.

Currently, section 981.80 specifies that the Board is authorized to incur expenses during each crop year. The recommendation of the Board for their expenses each year must be submitted to the Secretary on or before August 1 of the crop year. Expenditures are then incurred on a yearly basis.

Proponents testified at the hearing that the Board has been handicapped in the areas of research and marketing by the inability to enter into multi-year contracts. The Board is required to do business on a year-to-year basis. Some contracting parties become disillusioned because a concept may take several years to develop and implement and they are restricted to contracting for only a year at a time. The contracting parties may find that it is not economically feasible to enter into a contract without a commitment of more than one year. This often results in lost opportunities for the Board in being forced to negotiate for a one year contract that may be more expensive and less desirable than a contract covering more than one year.

At the hearing, the proponents stated that the California Agricultural Statistics

Service (CASS) was asked to deliver a proposal for an acreage survey. The cost of the survey was considered to be too high for a single year's budget. The CASS then suggested a two year proposal in which they would survey one half the crop one year and the other half the next year. Record evidence indicated that the Board contracted to survey one-half this year, but will be prohibited from committing to the project's completion. A new Board next year may change its mind which could lead to development of a survey for one half of the crop. This would not be a desirable use of Board's funds.

The proponents further testified that the adoption of this amendment would have a positive economic impact. The Board does not anticipate that all or most future business activities would take the form of a multi-year contract. However, where needed and cost effective, the proponents testified that the ability to enter into such agreements should be available.

At the hearing, further discussions focused on the proposal to have three-year terms of office for Board members and how this would affect five-year contracts that could be in effect. Proponents testified that this particular situation occurs everyday in businesses and corporations where the directors that are there could very well be turned over and not be there when the contract comes to a conclusion. The proponents further testified that they envision that such multi-year contracts could be used for a building lease or the development of a new almond product.

The record evidence shows that marketing order committees have already been given permission, on a case-by-case basis, to enter into multi-year contracts, although such contracts are contingent on the marketing order remaining in effect. Also, some of the Board's research and promotion projects are currently four or five year projects. Proponents, however, testified that these projects have been funded only on a yearly basis. The record evidence showed that funding a project on a year-by-year basis would allow the Board to evaluate the progress of the project and decide if it should be continued. The marketing order is designed to operate on an annual basis and to be evaluated by the Secretary on an annual basis. The record evidence also showed that the Department has given permission to marketing order boards and committees, on a case-by-case basis, to enter into multi-year contracts.

The Act provides that marketing order committees establish budgets and assessment rates on a periodic basis. The marketing order requires that the

expenses and assessment rate be established for each crop year. This allows for evaluation by the Board and the Secretary of Board activities on an annual basis. The Secretary is responsible for oversight of Board activities and believes that this proposal could limit the annual reviews as well as restrict the activities of future Boards. It is acknowledged, however, that multi-year contracts, in some instances, could benefit the Board by allowing for long-range, cost-effective planning. It is preferred that these situations be handled on a case-by-case basis.

Accordingly, the record evidence does not support the amendment for the Board to be allowed to enter into multi-year contracts. Therefore, this proposed amendment is not recommended.

#### *Material Issue Number 26*

Two proposed amendments to section 981.90 would require that continuance referenda be conducted. One proposal would have required that continuance referenda be conducted every five years beginning July 31, 1999, to determine grower support for continuation of the marketing order for almonds. Another proposal would have required that continuance referenda be conducted every four years with the first to be held in 1996.

Currently, there is no provision in the marketing order that provides for periodic continuance referenda.

The proponents for five-year referenda testified that the growers should have the ability to vote for continuance or termination of the marketing order. These referenda would allow growers to have a voice as to the value of the almond marketing order. The proponents testified that they realize that circumstances change over time, and therefore believe that a time period of five years would allow for a timely debate as to the merits of continuing or terminating the marketing order.

The proponents' proposal for five-year referenda also contained language regarding termination of the marketing order that is already contained in the order. The proponents testified that they would agree to the criteria which the Secretary may use in determining whether the marketing order should continue.

The order currently provides that the Secretary shall terminate the order if a majority of all growers favor termination and such majority produced more than 50 percent of the almonds for market within the State of California. Since less than 50 percent of all growers usually participate in a referendum, it is

difficult to determine grower support for termination of an order.

Another way of assessing whether growers favor the continuation of an order would be to hold a continuance referendum using the same criteria as set forth in section 8c(8) of the Act with respect to producer approval of the issuance of a marketing agreement and order. This section of the Act requires approval by two-thirds of the producers voting in the referendum or by producers who have produced two-thirds of the volume of the production voted during a representative period. This is a reasonable and appropriate basis for determining whether almond growers favor continuation of the order.

In the event that the requisite majority of growers, by number or volume of production represented in the referendum, do not approve continuance of the order, the Secretary may consider termination of the order but would not be required to terminate. In evaluating the merits of termination, the Secretary would not only consider the results of the continuance referendum, but also would consider all other relevant information concerning the operation of the order and the relative benefits and disadvantages to producers, handlers, and consumers in order to determine whether continued operation of the order would tend to effectuate the declared policy of the Act. In this regard, the Secretary may solicit input from the public through meetings, press releases, or any other means. The proponents testified at the hearing that in evaluating the merits of continuing the order, they would like to see the Secretary not only consider the results of the continuance referendum but also consider information relative to the operation of the marketing order.

Proponents of the proposal for four-year continuance referenda testified that a vote for continuance should be held in 1996. They testified that two years of operating under the new amendments should be adequate time for the growers to make a well-informed decision as to whether the program is effective.

Proponents in favor of the four-year referenda proposal testified that because of the lack of referenda in the past (the only continuance referendum on the almond marketing order was conducted in 1989), it is appropriate to have a continuance referendum every four years.

Based on evidence and testimony submitted at the hearing relative to periodic referenda, the order should be amended to require that such referenda be conducted.

It is USDA's preference to provide for periodic referenda at least every six

years to allow growers an opportunity to indicate their support for or rejection of the order. The record evidence demonstrates that the proposal for referenda every five years is reasonable and has widespread industry support. A referendum every five years would allow growers an opportunity to vote in favor or in opposition to the order as changes occur in the industry yet would not be wasteful of the Board's resources. For the above reasons, the order should be amended to provide for periodic referenda every five years beginning two years from the year these amendments are finalized. Conducting a continuance referendum two years after the implementation of the proposed amendments would allow the industry sufficient time to evaluate the new amendments and determine if the marketing order should continue in effect. Therefore, the proposed amendment, as modified, is recommended.

#### *Material Issue Number 27*

Sections 981.51, 981.54, 981.55, and 981.66, which relate to certain reserve provisions, should not be deleted from the marketing order. In addition, §§ 981.52 and 981.67, also relating to the reserve, should not be amended as proposed. Section 981.55 should be amended to clarify that handlers may be authorized to transfer reserve almonds to another handler.

Extensive record testimony indicated this proposal had three basic purposes. One purpose was to eliminate authority in the marketing order that requires reserve almonds to be sold in secondary or market development outlets. Another purpose was to allow handlers to sell their reserve almonds and the accompanying reserve obligation to another handler. The remainder of the proposal was to make conforming changes in the order language to coincide with the two aforementioned purposes.

The proponent of this proposal testified that reserve almonds should not be required to be sold to secondary outlets (where the return is significantly lower). The proponent believed that this was not economically sound, and explained that, if reserves are established, the reserve almonds should ultimately be sold in normal competitive outlets at some point in the future. The proponent testified that reserve almonds could be carried forward for several years to augment short supplies in the event of a crop failure.

Opponent's testimony indicated that the option of having reserves in effect for consecutive years already exists in

the marketing order. The proposal would maintain that option, but would eliminate the order's flexibility to require disposition in non-competitive outlets. The proponent failed to offer any economic analysis in support of carrying reserve product forward indefinitely, as opposed to diverting the product.

The proponent also testified that the reserve program had been manipulated in the past by the Board in that Board members were aware of Board decisions well in advance of the rest of the industry, thus, placing them at an advantage over the remainder of the industry.

No evidence was presented at the hearing indicating that Board members are aware of final Board recommendations prior to the voting process. To the contrary, it was testified that many Board members act independently. Further, Board members are elected through a democratic process and, therefore, risk not being renominated if they do not fairly represent their constituency.

The proponent testified that handlers should be able to sell their reserve almonds and accompanying reserve obligation to other handlers. A large number of handlers in the industry handle a relatively small proportion of the crop and operate for only a few months each year. Other larger handlers operate on a year-round basis. The proponent testified that the smaller handlers, who would normally cease their handling operation, are forced to maintain, at an additional cost to them, the required inventory in good condition in storage. If these small handlers do not want to incur the additional costs, the proponent stated the only other option available is disposition to approved reserve outlets at significantly lower prices. The proponent stated that handlers that dispose of their reserve almonds in secondary outlets could be financially disadvantaged in the event the reserve is released to the saleable category after their disposition.

Opponents stated that the proposal contained several provisions and eliminations of provisions that appeared to be in conflict with one another. Therefore, it was not clearly understood what exactly the proposal in its entirety was attempting to accomplish. Additional rationale against the proposal was a general difference in philosophy regarding eliminating tools of the marketing order currently available to the industry.

As previously stated, the proposal contained three basic purposes. The first purpose involved eliminating the

authority to require reserve almonds to be sold in secondary outlets. We agree with the position that there is authority in the marketing order to release all of the reserve, making it unnecessary to sell reserve almonds in non-competitive outlets, if recommended by the Board. Removing the Board's authority to recommend to the Secretary that reserve almonds be sold in these outlets would remove an option available to the Board that may be considered necessary and in the best interest of the industry under certain circumstances. It is determined that the Board should retain flexibility in this regard and that this portion of the proposal would place an unnecessary restriction on the Board in making recommendations to the Secretary regarding the reserve. For this reason, this part of the proposal is not recommended.

Record evidence supports the merits of the second portion of this proposal dealing with selling reserve almonds and transferring reserve obligations to another handler. The overall intent of the reserve program could still be met as long as the same total quantity of product was held off the market. Providing handlers the additional authority to transfer any or all of their reserve obligations to other handlers in the industry could help facilitate the operation of the reserve program by providing more flexibility. In order to ensure such a provision is administered properly, it would be necessary for the Board, with the approval of the Secretary, to implement regulations to effectuate such a provision.

The third purpose of the proposal involved eliminating certain sections of the order to correspond with the other purposes of this proposal. However, it is not necessary to delete these sections of the marketing order as proposed to accomplish that portion of the proposal that is being accepted and recommended herein.

For the aforementioned reasons, this proposed amendment is recommended, in part, by modifying § 981.55 to provide the authority for the Board, with the approval of the Secretary, to allow handlers to transfer their reserve obligation to other handlers.

#### *Material Issue Number 28*

The proposed amendment to § 981.50 would have required that, when a reserve is established, the first 250,000 pounds of almonds handled by a handler would be exempt from the reserve percentage. In addition, the exemption would not apply to a handler who has not been a handler and paid assessments for each of the two previous crop years and/or to one who has been

associated or under contract with or is a director, controller, shareholder, owner, or partner in any other handler facility taking advantage of the exemption.

Currently, § 981.50 provides that each handler shall withhold from handling a quantity of almonds equal to the reserve percentage of the kernelweight of all almonds such handler receives for his/her own account during the crop year. There is no quantity reserve exemption in the marketing order at this time.

The proponent testified that the purpose of this amendment is to benefit small handlers. A small handler's cost per pound to operate is much greater than that of a larger handler. The small handler, defined as one who handles less than 250,000 pounds annually, would probably close such facility after the handling season, but must remain open to maintain the reserve almonds. Record evidence indicated that small handlers that handle less than 250,000 pounds would be treated differently since there would be a differential impact of reserve requirements on such handlers.

The proponent testified that the conditions for the exemption are there to prevent people from becoming handlers during the year of regulation to take advantage of the 250,000 pound reserve exemption. The condition for the exemption would prevent people from anticipating that a reserve is going to be established.

At the hearing, it was discussed that possibly a creative attorney could breakdown a single business into separate entities so that each one would handle less than 250,000 pounds to take advantage of the exemption. However, the proponent testified that he did not see that as a problem under this proposal because of the criteria for eligibility written into the proposal.

Opponents testified that the proposal would create two classes of handlers, those who have to participate in the reserve and those who do not. The proposal is also based on an arbitrary level of 250,000 pounds. Record evidence stated that the strength of the marketing order is that all members of the industry participate in the order and the rules and regulations apply to everyone across the board. The exemption would only serve to cut the industry into very small segments that would dilute the strength of the order. This proposal would create an opportunity for those inclined to take advantage of any loopholes and benefit from them. Opponents further testified that by eliminating a proportion of handlers from the reserve, the burden

would fall on fewer handlers causing them financial hardship.

The record evidence indicated that the Act provides that reserve provisions should be applied uniformly throughout the entire industry. While all handlers would have the same exemption under this proposal, those handlers that handled over 250,000 pounds would be regulated and those who handled less than that amount would not be regulated. The Department disagrees with the proponent's assertion that administering this proposal would not be problematic. It would be difficult to implement this proposal and develop equitable regulations covering all situations that could occur. The record evidence also indicated that this proposal could potentially have an effect on the market if there were many handlers that handled less than 250,000 pounds of almonds. This in turn would place more of a burden on those regulated handlers that handled more than 250,000 pounds of almonds.

Accordingly, the record evidence does not support the proposal to require that when a reserve is established, the first 250,000 pounds handled by a handler would be exempt from the reserve percentage. Therefore, this proposed amendment is not recommended.

#### *Material Issue Number 29*

The proposed amendment to § 981.71 would have required incoming inspections to be conducted no later than the last day of February during the then current crop year.

Section 981.71, which provides for furnishing statistical information to the Board for purposes of establishing the reserve obligation, was suspended indefinitely in 1975. Section 981.42 provides that handlers shall obtain incoming inspection through the Federal-State inspection service to determine the amount of inedible kernels in each variety and report the determination to the Board.

A proponent at the hearing testified that the incoming inspection is needed in order to determine the size of the industry's total crop. The industry needs to know no later than the end of February of each year, the quantity of almonds received by handlers for election purposes, Board statistical use, reserve calculations, and assessment calculations. The proponent testified that the longer inspection is delayed, the longer payment of assessments is also delayed. If the Board is going to receive the assessment money, they would prefer to receive it earlier. If a handler receives almonds after the February date, the handler should

assume a penalty or completely reject the almonds for delivery.

Statistics presented at the hearing indicate, however, that since 1980 almonds received by handlers through the month of February in any given year have exceeded 97 percent of the total almonds received for the entire crop year. In most years, the receipts through February exceeded 99 percent of the total. Based on this information, there would be no appreciable difference in the estimated crop size at that point of the season if all almonds were required to be inspected by February 28 of each year. In addition, there would be no appreciable difference in handlers' share of the crop handled for election purposes.

Handlers are currently required to report to the Board all almonds received for their account during several prescribed periods. This information is combined with other information reported to the Board to determine handlers' assessment and reserve obligations. Inspection certificates are used to verify information reported to the Board and for determining inedible obligations. They are not necessary for the Board to make assessment billings and determine reserve obligations.

If implemented, this proposal may subject handlers to civil or criminal penalties for having product inspected after February 28. It would also have the effect of dictating to growers when they have to sell and deliver their product to a handler. It is conceivable that for financial reasons, a grower may choose to store his or her product until late in the season before selling it to a handler. This proposed amendment would, in effect, prohibit such a practice.

While the proposed amendment could, in some instances, serve to facilitate the operations of the Board, the positive aspects of such a proposal are outweighed by the negative. Regulating the industry in this regard would place an undue burden on both growers and handlers which is not necessary for the functioning and administration of the program.

For the reasons stated above, this proposed amendment is not recommended.

#### **Rulings on Briefs of Interested Persons**

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such

findings or to reach such conclusions are denied.

#### **General Findings**

(1) The findings hereinafter set forth are supplementary to the previous findings and determinations which were made in connection with the issuance of the marketing agreement and order and each previously issued amendment thereto. Except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein, all of the said prior findings and determinations are hereby ratified and affirmed;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of almonds grown in California in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act; and

(5) All handling of almonds grown in California as defined in the marketing agreement and order, as amended, and as hereby proposed to be further amended, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

#### **List of Subjects in 7 CFR Part 981**

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

#### **Recommended Further Amendment of the Marketing Agreement and Order**

For the reasons set out in the preamble, 7 CFR part 981 is proposed to be amended as follows:

#### **PART 981—ALMONDS GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 981 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Section 981.14 is revised to read as follows:

**§ 981.14 Cooperative handler.**

*Cooperative handler* means any handler as defined in § 981.13 of this subpart which qualifies for treatment as a nonprofit cooperative association as defined in Section 54001, *et seq.* of the California Food and Agricultural Code. The Board, with the approval of the Secretary, may modify this definition, if necessary.

3. Section 981.16 is revised to read as follows:

**§ 981.16 To handle.**

*To handle* means to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of almonds owned by another) or in any other way to put almonds grown in the area of production into any channel of trade for human consumption worldwide, either within the area of production or by transfer from the area of production to points outside or by receipt as first receiver at any point of entry in the United States or Puerto Rico of almonds grown in the area of production, exported therefrom and submitted for reentry or which are reentered free of duty. However, sales or deliveries by a grower to handlers, hullers or other processors within the area of production shall not, in itself, be considered as handling by a grower.

4. Section 981.18 is amended by removing the word "and" at the end of paragraph (b); removing the period and adding ", and" at the end of paragraph (c); and adding a new paragraph (d) to read as follows:

**§ 981.18 Settlement weight.**

\* \* \* \* \*

(d) For inedible kernels as defined in § 981.8.

5. Section 981.19 is revised to read as follows:

**§ 981.19 Crop year.**

*Crop year* means the twelve month period from August 1 to the following July 31, inclusive. Any new crop almonds harvested or received prior to August 1 will be applied to the next crop year for marketing order purposes. The first crop year after the implementation of this amendment shall be a 13-month period.

6. Section 981.21 is revised to read as follows:

**§ 981.21 Trade demand.**

*Trade demand* means the quantity of almonds (kernelweight basis) which commercial distributors and users such as the wholesale, chain store,

confectionery, bakery, ice cream, and nut salting trades will acquire from all handlers during a crop year for distribution worldwide.

7. Sections 981.30 and 981.31 are revised to read as follows:

**§ 981.30 Establishment.**

The Almond Board shall consist of twelve members, each with an alternate member.

**§ 981.31 Membership representation.**

Membership of the Board will be determined in the following manner:

(a) Three members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (a)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) Those growers who market their almonds through cooperative handlers; and

(2) Those growers who market their almonds through other than cooperative handlers.

(b) Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (b)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) Cooperative handlers; and

(2) All handlers, other than cooperative handlers.

(c) One member and an alternate shall be selected from nominees submitted by each of the following groups designated in paragraphs (c)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) The group of cooperative handlers or the group of handlers other than cooperative handlers, whichever received for their account more than 50 percent of the almonds delivered by all growers as determined by December 31 of the then current crop year; and

(2) Those growers whose almonds were marketed through the handler group identified in paragraph (c)(1) of this section.

(d) The Secretary, upon recommendation of the Board, or other information, may reapportion within the 12-member Board, the number of grower members or handler members, or both, of any group listed in § 981.31 (a) through (c), to be nominated pursuant to § 981.32. Any such change shall be based, insofar as practicable, upon the proportionate amounts of almonds handled within any group.

8. Section 981.32 is amended by revising paragraph (a) and amending paragraph (b)(2) by removing the date

"March 31" and adding in its place the date "December 31" to read as follows:

**§ 981.32 Nominations.**

(a) *Method.* (1) Each year the terms of office of three of the members elected pursuant to Section 981.31(a) and (b) shall expire, except every third year when the term of office for four of those members shall expire. Nominees for each respective member and alternate member shall be chosen by ballot delivered to the Board. Nominees chosen by the Board in this manner shall be submitted by the Board to the Secretary on or before February 20 of each year together with such information as the Secretary may require. If a nomination for any Board member or alternate is not received by the Secretary on or before February 20, the Secretary may select such member or alternate from persons belonging to the group to be represented without nomination. The Board shall mail to all handlers and growers, other than the cooperative(s) of record, the required ballots with all necessary voting information including the names of incumbents willing to accept renomination, and, to such growers, the name of any person proposed for nomination in a petition signed by at least 15 such growers and filed with the Board on or before January 20. Distribution of ballots shall be announced by press release, furnishing pertinent information on balloting, issued by the Board through newspapers and other publications having general circulation in the almond producing areas.

(2) Nominees for the positions described in § 981.31(c) shall be handled in the same manner as described in paragraph (a)(1) of this section except that those terms of office shall expire annually.

\* \* \* \* \*

9. Section 981.33 is revised to read as follows:

**§ 981.33 Selection and term of office.**

(a) Members and their respective alternates for positions open on the Board shall be selected by the Secretary from persons nominated pursuant to § 981.32, or, at the discretion of the Secretary, from other qualified persons, for a term of office beginning March 1. Members and alternates shall continue to serve until their respective successors are selected and qualified.

(b) The term of office of members of the Board shall be for a period of three years beginning on March 1 of the years selected except where otherwise provided. However, for the initial ten members of the Board selected pursuant

to this section and to paragraphs (a) and (b) of § 981.31, three members shall serve for a term of one year; three members shall serve for a term of two years; and four members shall serve for a term of three years. For the initial terms of office, at the time of nomination under § 981.32, the Board shall make this designation by lot. The term of office for the two members selected under paragraph (c) of § 981.31 shall always be for a period of one year.

(c) Board members may serve for a total of six consecutive years. Members who have served for six consecutive years must leave the Board for at least one year before becoming eligible to serve again. A person who has served less than six consecutive years on the Board may not be nominated to a new three year term if his or her total consecutive years on the Board at the end of that new term would exceed six years. This limitation on tenure shall not include service on the Board prior to implementation of this amendment and shall not apply to alternate members.

10. Section 981.34 is revised to read as follows:

**§ 981.34 Qualification and acceptance.**

(a) Any person to be selected as a member or alternate of the Board shall, prior to such selection, qualify by providing such background information as necessary and by advising the Secretary that he/she agrees to serve in the position for which nominated. Grower members and alternates shall be growers or employees of growers, and handler members and alternates shall be handlers or employees of handlers. In the event any member or alternate ceases to be qualified for the position for which selected, that position shall be deemed vacant.

(b) The Board, with approval of the Secretary, may establish additional eligibility requirements for grower members on the Board.

11. Section 981.40 is amended by revising paragraphs (b) and (c) and amending paragraph (e) by removing the word "seven" and adding in its place the word "eight" to read as follows:

**§ 981.40 Procedure.**

\* \* \* \* \*

(b) *Quorum*. The presence of eight members shall be required to constitute a quorum. All decisions of the Board shall be as follows except where otherwise specifically provided: 8 or 9 members present, 6 votes; 10 members present, 7 votes; 11 or 12 members present, 8 votes.

(c) *Voting by mail, telegram or fax*. The Board may vote by mail, telegram

or fax upon written notice to all members, or alternates acting in their place, including in the notice a statement of a reasonable time, not to exceed 10 days, in which a vote by mail, telegram or fax must be received by the Board for counting. Voting by mail, telegram or fax shall not be permitted at any assembled meeting of the Board. When a proposition is submitted for vote by mail, telegram or fax, at least ten members of the Board must vote in favor of its passage or the proposition shall be defeated.

\* \* \* \* \*

12. In § 981.41, paragraph (c) is amended by removing the colon and all text following the words "15 percent" in the last sentence and adding in its place a period and by amending paragraph (a) by adding a sentence at the end of the paragraph to read as follows:

**§ 981.41 Research and development.**

(a) \* \* \* Notwithstanding the foregoing, certified organic almonds may be exempt from assessments for marketing promotion, including paid advertising, upon recommendation of the Board and approval of the Secretary.

\* \* \* \* \*

13. Section 981.47 is amended by designating the existing paragraph as (a), removing the words "either domestic or" in the third sentence of paragraph (a), and adding a new paragraph (b) to read as follows:  
§ 981.47 Method of establishing salable and reserve percentages.

\* \* \* \* \*

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary shall exempt from any reserve that is established that part of the crop which is sold as "certified organic" under standards established by the Organic Foods Production Act of 1990, (7 U.S.C. 2101 *et seq.*) and the California Organic Foods Act of 1990, as amended. The Board may propose regulations to assure procedures to implement this section.

14. In § 981.49, the introductory paragraph is amended by removing the word "six" and adding in its place the word "eight", by removing "; and" in paragraph (e) and adding a period in its place, by adding "and" at the end of paragraph (d); by removing paragraph (f) and by revising paragraph (b) to read as follows:

**§ 981.49 Board estimates and recommendations.**

\* \* \* \* \*

(b) The estimated handler carryover and the estimated reserve inventory as of July 31;

\* \* \* \* \*

**§ 981.50 [Amended]**

15. Amend § 981.50 by adding after the words "into oil", the words "or sold as certified organic."

16. Amend § 981.55 by designating the existing paragraph as (a) and adding a new paragraph (b) to read as follows:

**§ 981.55 Interhandler transfers.**

\* \* \* \* \*

(b) When saleable and reserve percentages are in effect, any handler may transfer reserve withholding obligation to other handlers. Terms and conditions implementing this provision must be recommended by the Board and approved by the Secretary.

17. Section 981.60 is amended by revising paragraph (b) to read as follows:

**§ 981.60 Determination of kernel weight.**

\* \* \* \* \*

(b) *Almonds for which settlement is made on unshelled weight*. The settlement weight for unshelled almonds shall be determined on the basis of representative samples of unshelled almonds reduced to shelled weight.

18. Section 981.61 is amended by revising the last sentence to read as follows:

**§ 981.61 Redetermination of kernel weight.**

\* \* \* \* \* Weights used in such computations for various classifications of almonds shall be:

(a) For unshelled almonds, the kernel weight based on representative samples reduced to shelled weight;

(b) For shelled almonds, the net weight; and

(c) For shelled almonds used in production of almond products, the net weight of such almonds.

**§ 981.62 [Removed]**

19. Section 981.62 is removed.

**§ 981.66 [Amended]**

20. Section 981.66 is amended by removing paragraphs (b) and (d), redesignating paragraph (c) as paragraph (b), redesignating paragraph (e) as paragraph (c), redesignating paragraphs (f) and (g) as paragraphs (d) and (e), and by amending newly designated paragraph (c) by removing all references to the date "September 1" and adding in each place "December 31".

**§ 981.67 [Amended]**

21. Section 981.67 is amended by removing all references to the date "September 1" and adding in each place "December 31".

22. Section 981.70 is amended by revising the first sentence to read as follows:

**§ 981.70 Records and verification.**

Each handler shall keep records which will clearly show the details of his or her receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, as well as other pertinent information regarding his or her operation pursuant to the provisions of this part: *Provided*, that, such records shall be kept in the State of California. \* \* \*

23. A new § 981.76 is added before the undesignated center heading "Expenses and Assessments" to read as follows:

**§ 981.76 Handler List of Growers.**

No later than December 31 of each crop year, each handler other than a cooperative handler (hereinafter, referred to as independent handler) governed by this subpart shall, upon request, submit to the Board a complete list of growers who have delivered almonds to such independent handler during that crop year.

24. Section 981.81 is amended by adding a new paragraph (e) to read as follows:

**§ 981.81 Assessment.**

\* \* \* \* \*

(e) Any assessment not paid by a handler within a period of time prescribed by the Board may be subject to an interest or late payment charge or both. The period of time, rate of interest and late payment charge shall be as recommended by the Board and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

25. Section 981.90 is amended redesignating paragraph (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4) and by amending newly designated paragraph (b)(3) by removing the date "June 1" and adding in its place "July 1" and adding a new (b)(2), to read as follows:

**§ 981.90 Effective time, suspension, or termination.**

\* \* \* \* \*

(b) \* \* \*

(2) The Secretary shall conduct a referendum as soon as practical after the end of the fiscal year ending two years after implementation of this amendment, and at such time every fifth year thereafter, to ascertain whether continuation of the order is favored by growers who have been engaged in the production of almonds for market within the State of California during the current crop year.

\* \* \* \* \*

**§ 981.467 [Amended]**

26. In § 981.467, paragraph (a) is amended by removing the date "July 1" and adding in its place "August 1" and by removing the words "export or" and "or both," from the second sentence in paragraph (a).

**§ 981.462 [Amended]**

27. In § 981.472, paragraph (a) is amended by removing the dates "July 1 to August 31" and adding in its place "August 1 to August 31."

Dated: March 22, 1995.

**Lon Hatamiya,**

*Administrator.*

[FR Doc. 95-8205 Filed 4-5-95; 8:45 am]

BILLING CODE 3410-02-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 95-ANE-10]

**Airworthiness Directives; General Electric Company CF6 Series Turbofan Engines**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to General Electric Company (GE) CF6-45/-50 series turbofan engines. This proposal would require an initial and repetitive on-wing visual inspection of the side links of the five-link forward mount assembly for cracks, and replacement of the side links and pylon attachment bolts, and inspection of the fail-safe bolt and platform lug, if the side links are found cracked. This proposal would also require a shop-level refurbishment of the side links as a terminating action to the on-wing inspection program. This proposal is prompted by four reports of cracked side links detected during routine engine shop visits. The actions specified by the proposed AD are intended to prevent a side link fracture, which could result in the failure of the second side link, or the forward engine mount pylon attachment bolts, and possible separation of the engine from the aircraft.

**DATES:** Comments must be received by May 8, 1995.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England

Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 95-ANE-10, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from General Electric Aircraft Engines, CF6 Distribution Clerk, Room 132, 111 Merchant Street, Cincinnati, OH 45246. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington MA.

**FOR FURTHER INFORMATION CONTACT:**

Robert J. Ganley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (617) 238-7138; fax (617) 238-7199.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 95-ANE-10." The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the